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No.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES STEEL CORPORATION, *et al.* ON BEHALF OF THEMSELVES AND ALL PERSONS SIMILARLY SITUATED,
Appellants,

v.

MULTISTATE TAX COMMISSION, *et al., Appellees.*

On Appeal from the United States District Court for the Southern District of New York

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JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

The appellants[1] file this appeal to review the judgment of the United States District Court for the

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[1] The plaintiffs below were United States Steel Corporation, Standard Brands Incorporated, General Mills, Inc., and The Procter & Gamble Distributing Company. On February 5, 1974, the court below permitted Bristol Myers Co., Eltra Corporation, Goodyear Tire and Rubber Company, Green Giant Company, International Business Machines Corporation, International Harvester Company, International Paper Company, International Telephone and Telegraph Corporation, McGraw-Hill, Inc., NL Industries, Inc., Union Carbide Corporation, and Xerox Corporation to intervene as plaintiffs. International Business Machines and Xerox withdrew as inter-

Southern District of New York entered July 14, 1976, granting appellees[2] summary judgment and upholding the constitutionality of the Multistate Tax Compact, and submit this Statement to show that this Court has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court (Appendix A, *infra*, pp. 1a-21a)[3] is reported in 417 F. Supp. 795. An earlier opinion (Appendix B, *infra*, pp. 22a-47a), on motion to dismiss, is reported at 367 F. Supp. 107 (S.D. N.Y. 1973).

venor plaintiffs before decision. The Court also ordered that the suit proceed as a class action.

The original plaintiffs and the remaining intervenors are the appellants here.

[2] Appellees named as defendants in the case below are the Multistate Tax Commission, Eugene P. Corrigan, Executive Director of the Multistate Tax Commission, and Eric E. Wohlforth (Alaska), Richard Heath (Arkansas), John H. Heckers (Colorado), J. Ed. Straughn (Florida), Ralph W. Kondo (Hawaii), Ewing H. Little (Idaho), Jas. O. Mathis (Indiana), James T. McDonald (Kansas), Allison Green (Michigan), James Schaffner (Missouri), J. Morley Cooper (Montana), Wm. E. Peters (Nebraska), John J. Sheenan (Nevada), Fred L. O'Cheskey (New Mexico), Bryon L. Dorgan (North Dakota), Charles H. Mack (Oregon), Robert F. Calvert (Texas), Vernon L. Holman (Utah), George Kinnear (Washington) and E. S. MacClean (Wyoming), all Commissioners of the Multistate Tax Commission from their respective states. George E. Mahin, Tax Commissioner of the State of Illinois, was named as a defendant at the start of the suit, but Illinois withdrew from the Multistate Tax Compact and the Multistate Tax Commission on August 29, 1975, and Mahin was not listed as a defendant in the lower court's caption of the case. Florida also withdrew from the Compact, effective October 1, 1976. Since the suit was started, California and South Dakota have become members of the Multistate Tax Compact and Commission. Alabama has adopted the Compact subject to the consent of Congress.

[3] The Appendix is separately bound. The pages are numbered with an "a" suffix in order to distinguish them from the pages in this Jurisdictional Statement.

JURISDICTION

The complaint in this case sought declaratory and injunctive relief against implementation and enforcement of state statutes constituting a compact between the states, as contrary to the Constitution of the United States. The action was heard by a three judge district court pursuant to 28 U.S.C. §§ 2281, 2284.

The judgment of the District Court was entered July 14, 1976 (Appendix C, *infra*, pp. 49a-50a), and notice of appeal was filed in that court on September 7, 1976 (Appendix D, *infra*, p. 51a).

Jurisdiction to review the judgment is conferred on this Court by 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether the Multistate Tax Compact, as enacted and applied, is invalid because it has failed to obtain the consent of Congress, in violation of Article I, Section 10 of the Constitution of the United States.

2. Whether the Multistate Tax Compact, as enacted and applied, is invalid because it impermissibly burdens interstate commerce in violation of Article I, Section 8 of the Constituton of the United States.

3. Whether the Multistate Tax Compact, as enacted and applied, is invalid because it fails to provide adequate notice, standards of conduct,

and remedies to those which it seeks to regulate, in violation of Section 1 of the Fourteenth Amendment.

4. Whether the District Court erred in deciding the case upon a motion for summary judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 10 of Article I of the Constitution of the United States provides in part:

> "No state shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . ."

Section 8 of Article I of the Constitution of the United States provides, in part:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . ."

Section 1 of the Fourteenth Amendment of the Constitution of the United States provides , in part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Multistate Tax Compact is set out in Appendix E, *infra*, pp. 54a-79a.[4]

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[4] The version in the Appendix is the model version. The state code citations are as follows: Alaska, Alas.Stat. § 43.10.010; Arkansas, Ark.Stat. 1947, § 84-4101; Colorado, Colo.Rev.Stat. 1973, Art. 24-60-301; Florida, Fla.Stat.Ann. § 213.15, repealed Fla. Sessions Law 76-149; Hawaii, Hawaii Rev.Stat. § 255-1; Idaho, Idaho Code § 63-3701; Indiana, Burns' Ind.Stat.Ann. § 6-8-9-101; Kansas, Kan. Stat.Ann. § 79-4301; Michigan, Mich.Comp.Laws Ann. § 205.581; Missouri, Mo.Rev.Stat., 1969, § 32.200; Montana, Mont.Rev.Code 1947, § 84-6701; Nebraska, Neb.Rev.Stat. 1943, § 77-2901; Nevada, Nev.Rev.Stat. § 376.010; New Mexico, N.M.Stat.Ann. 1953 § 72-15A-37, 44; North Dakota, N.D.Cent.Code, § 57-59-01; Oregon, Or. Rev.Stat. § 305.655; Texas, Tex.Civil Stat., Art. 7359a; Utah, Utah Code Ann. 1953, § 59-22-1; Washington, Wash.Rev.Code Ann., § 82.56; Wyoming, Wyo.Stat. 1957, § 39-376. California adopted the Compact effective January 1, 1976. Deering Calif. Code Ann. § 38001. South Dakota became a member July 1, 1976. S.D.Comp. Laws 10-54.

STATEMENT OF THE CASE

The Multistate Tax Compact was drafted during 1966 following this Court's decision in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959), and as an aftermath of deliberations in Congress which led to the enactment of the Act of September 14, 1959, P.L. 86-272, 73 Stat. 555. The Compact became effective by its own terms on August 4, 1967 when the seventh state adopted it. Twenty-one states have now joined in the Compact by statutory enactment.

Article VI of the Compact creates the Multistate Tax Commission, an independent body designed to implement and administer the Compact. The Commission is composed of one member from each of the participating states, who together appoint an Executive Director as chief administrator of the Compact. Serving under the Executive Director are auditors and other officials who carry out the business of the Commission. The Commission has offices in Boulder, Colorado, Chicago, Illinois and New York, New York.

The Multistate Tax Compact grants the Commission various powers. For example, the Commission can issue regulations and prescribe uniform forms for the taxation of interstate business whenever the tax laws of two or more member states are similar or uniform. The Commission has adopted a number of regulations pursuant to this power, including regulations calling for combined reporting and full apportionment of the nonbusiness income of multistate taxpayers.[5]

The Commission is also empowered to conduct "interstate audits." The Commission may conduct such audits upon the request of one or more of the member states, or it may offer to conduct such audits based on its own determination that the proceedings would be of interest to the party states.[6] The Commission may also refuse to perform an audit requested by a state or states of the confederation.

Interstate audits are effectuated by the broad subpoena authority possessed by the Commission. The Commission may utilize the compulsory process of any court within the twenty-one member states in aid of its audit powers. Failure to comply with such process is punishable as contempt of the issuing court.

The Multistate Compact has not received the consent of Congress, although numerous bills have been intro-

[5] The power to issue regulations is contained in Article VII of the Compact. Such regulations are deemed advisory only unless adopted by the individual states. These regulations will be discussed more fully *infra*, pp. 17-20, 23-24.

[6] This independent power to audit taxpayers on a multistate basis is contained in Article VIII of the Compact. Article VIII is applicable only in those states which have specifically adopted it, but all members of the Compact have adopted it.

duced seeking such consent.[7] The appellants are all interstate business corporations and multistate taxpayers who have been subjected to demands by the Multistate Tax Commission to submit to interstate audits conducted by the Commission, pursuant to its regulations and practices. Appellants have refused such demands, in all cases offering to submit to lawful audits conducted by the states involved. The appellants have also offered to waive the applicable statutes of limitations while they pursued this action.

Proceedings Below

This action commenced with the filing of a complaint on August 11, 1972. An amended complaint was filed on January 10, 1973, seeking both a declaratory judgment that the Multistate Tax Compact, as then adopted by twenty-one states, was invalid under the United States Constitution, and a permanent injunction barring its operation and enforcement.

Before answering the complaint, appellees moved to dismiss the action on the ground that appellants had failed to state a claim upon which relief could be granted. Judge Tenney dismissed this argument as "frivolous," stating that the case would have to be decided on the merits. *See* 367 F. Supp. 107 (S.D.N.Y. 1973) (Appendix B, *infra*, pp. 22a).

[7] See S. 3892, 89th Cong., 2d Sess. (1966); S. 1551, 90th Cong., 1st Sess. (1967); S. 883, 90th Cong., 1st Sess. (1967); H.R. 13682, 90th Cong., 1st Sess. (1967); H.R. 9476, 90th Cong., 1st Sess. (1967); S. 1198, 91st Cong., 1st Sess. (1969); H.R. 9873, 91st Cong., 1st Sess. (1969); H.R. 6246, 91st Cong., 1st Sess. (1969); S. 1883, 92d Cong., 1st Sess. (1971); H.R. 6160, 92d Cong., 1st Sess. (1971); S. 3333, 92d Cong., 2d Sess. (1972); S. 2092, 93d Cong., 1st Sess. (1973). The member states and the Commission have lobbied vigorously for such consent. *See* Multistate Tax Commission Annual Reports, 1968-1975.

Appellees answered the complaint in September, 1973, and appellants filed a set of interrogatories in October.

By a memorandum order dated February 5, 1974 (Appendix F, *infra,* pp. 80a), Judge Tenney granted a motion by various multistate corporations to intervene as plaintiffs, and ordered the suit to proceed as a class action with appellants and intervenor-plaintiffs as class representatives.

In June, 1975, appellees moved for summary judgment and requested that the motion be heard by a three judge court. Appellants opposed the motion, arguing that substantial questions of fact needed to be resolved before it could be said that the Multistate Tax Compact did not affect the national interest, or the interests of states not members of the Compact, so as to require the consent of Congress. Additional facts also had to be developed to determine the degree and nature of the effect the Compact had on interstate commerce. Appellants further contended that the court should consider evidence on the operation and enforcement of the Compact, to determine if appellants were deprived of rights guaranteed them by the Fourth and Fourteenth Amendments.

In the alternative, appellants asked for summary judgment in their favor. They contended that under a proper construction of the Constitution, the Multistate Tax Compact was unconstitutional because it lacked the consent of Congress. Appellants also argued that the Compact as enacted encroached upon the commerce power of Congress.

The district court granted summary judgment in favor of appellees on July 14, 1976. In holding that

the Multistate Tax Compact does not require the consent of Congress, the court relied primarily on *Virginia* v. *Tennessee,* 148 U.S. 503 (1893), and *New Hampshire* v. *Maine,* decided June 14, 1976. The court held that the Compact does not increase the political power of the member states or interfere with the national interest.

The court also held that the Compact does not encroach upon the federal commerce power or unreasonably interfere with such commerce. The court stated that interstate taxation is not a matter of peculiar federal concern: "There is nothing inherent in the problems of multistate tax administration that would require federal regulation, nor has Congress yet identified these problems as a matter of peculiar federal concern." (App. A, *infra,* p. 13a.)

The decision also rejected the various arguments appellants had made under the Fourth and Fourteenth Amendments.

The opinion noted that related cases in various state courts have been stayed awaiting disposition of this action, and that three related suits were pending in other federal district courts. The Judicial Panel on Multidistrict Litigation, by order filed on February 8, 1976, deferred consideration of consolidation and transfer of these cases pending determination of this action.

Notice of appeal was filed September 7, 1976.

THE QUESTIONS ARE SUBSTANTIAL

I. THE COMPACT CLAUSE

A. The Scope of the Compact Clause

This case presents a constitutional question of significance and importance which has never been decided by this Court. The question is whether almost half the states of the Nation can join together under a compact which is designed to affect interstate commerce, and which creates an independent and regional administrative body, without the approval of Congress. Article I, Section 10 of the Constitution forbids any state from entering into an "Agreement or Compact" with any other state "without the Consent of Congress." Few cases questioning the validity of a compact lacking congressional consent have reached this Court, and the decisions have not been authoritative as far as the present question is concerned. *See e.g., Holmes* v. *Jenison,* 14 Peters 540 (1840); *Virginia* v. *Tennessee,* 148 U.S. 503 (1893); *Wharton* v. *Wise,* 153 U.S. 155 (1894); *North Carolina* v. *Tennessee,* 235 U.S. 1 (1914); *Virginia* v. *West Virginia,* 246 U.S. 565 (1918); *New Hampshire* v. *Maine,* decided June 14, 1976. No case has ever upheld the validity of a compact where many states are parties, and Congress has not given its consent.

The most frequently cited of these cases, and the one relied on below, is the opinion of Mr. Justice Field in *Virginia* v. *Tennessee.* In that case, the Court held that Congress had consented to the boundary settlement between Virginia and Tennessee that was the subject matter of the suit. Justice Field then went on to explain, in what was clearly a dictum, his understanding of the Compact Clause. He said (148 U.S. at 517-518):

> "The terms 'agreement' or 'compact' taken by themselves are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects; to those to which the United States can have no possible objection or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control."

This dictum was repeated in *North Carolina* v. *Tennessee, supra,* and *Virginia* v. *West Virginia, supra,* again in language not essential to the holdings. These cases both involved disputes arising from bilateral boundary settlements. Earlier this year, the Court cited Justice Field's explanation in yet another bilateral boundary case, after holding that the fundamental boundary dispute before the Court had been settled over two centuries earlier, and that no present legal adjudication was required. *New Hampshire* v. *Maine,* decided June 14, 1976.

Justice Field himself recognized the narrow scope of his statement in *Virginia* v. *Tennessee.* Writing one year later in *Wharton* v. *Wise, supra,* he stated that no compact was valid without the consent of Congress if it "might affect subjects placed under the control of Congress, such as commerce. . ." 153 U.S. at 171 (1894). In relying upon *Virginia* v. *Tennessee,* the District Court ignored this nearly contemporaneous explanation by Justice Field of the scope of the Compact Clause. That no narrow or strained reading of the Compact Clause is appropriate is evident from the manner in which Madison treats the Clause in *The*

Federalist (No. 43). He stated that the Clause falls "within reasonings . . . so obvious . . . that [it] may be passed over without remark." Indeed, there are dicta stating that Article I, Section 10 applies as written, without further gloss. Such an interpretation was advanced by Chief Justice Taney in *Holmes* v. *Jenison, supra.* This interpretation was also adopted by Mr. Justice Story (II Story, *Commentaries on the Constitution of the United States,* §1403 (5th Ed. 1891)), and urged by Henry Clay in *Green* v. *Biddle,* 8 Wheaton 1, 39-40 (1823). In *West Virginia ex rel. Dyer* v. *Sims,* 341 U.S. 22, 27 (1950), a case involving a multistate compact concerned with a regional pollution problem and approved by Congress, Mr. Justice Frankfurter stated, "The growing interdependence of regional interests, calling for regional adjustments, has brought extensive use of compacts. A compact is more than a supple device for dealing with interests confined within a region. That it is also a means of safeguarding the national interest is well illustrated in the Compact now under review. Not only was congressional consent required, as for all compacts; . . ."

Compacts among the states have increased dramatically in the past twenty years, and they are often used in situations much broader than the one time boundary settlements between only two states involved in *Virginia* v. *Tennessee, supra,* and *New Hampshire* v. *Maine, supra.*[8] Compacts now join together whole re-

[8] *See* the sections on "Interstate Compacts" in the biennial volumes of THE BOOK OF THE STATES, published by the Council of State Governments. *See also* RIDGEWAY, INTERSTATE COMPACTS: A QUESTION OF FEDERALISM; Engdahl, *Characterization of Interstate Arrangements: When is a Compact Not a Compact?,* 64 MICH. L. REV. 63 (1965). Ridgeway lists 36 compacts formed before 1920, 65 more between 1920 and 1955, and 40 more in the next 10 years alone.

gions, and create separate administrative bodies with continuous supervisory powers. Many of these compacts have obtained the consent of Congress.[9] In such cases, Congress has granted its approval only after a careful survey of non-party states and federal agencies to determine the actual and potential effects of the compact.[10] Such consent is usually restrictive, requiring further approval before changes in the compact may be made, or new members added. Congress has thus recognized its constitutional responsibility to scrutinize interstate agreements in the light of its conception of national policy, and to review any concentrations of power in the nation.

Other multistate compacts, however, have not obtained the consent of Congress. Relying on the dicta that appear in a number of boundary dispute cases, compacts like the Multistate Tax Compact have been put into operation despite the specific proscription of Section 10 of Article I. A clear and substantial question is thus presented as to the validity of this trend in

[9] The consent given to the Compact on Taxation of Motor Fuels Consumed by Interstate Buses and the Bus Taxation Proration and Reciprocity Agreement, Act of April 14, 1965, P.L. 89-11, 79 Stat. 58 is typical. *See* The Council of State Governments, INTERSTATE COMPACTS 1783-1956 for a compilation of past compacts considered by Congress, and the biennial volumes of THE BOOK OF THE STATES for compacts considered since 1956. See also Engdahl, *supra* note 8, at 69-73.

[10] For example, before consenting to the Compact on Taxation of Motor Fuels Consumed by Interstate Buses, Congress consulted the Commerce Department, the Justice Department, the Interior Department, the State Department, the Treasury Department, the Interstate Commerce Commission, and the District of Columbia (a jurisdiction affected because it is the headquarters for two major bus companies). *See* H.R. Rep. No. 102, 89th Cong., 1st Sess. (1965); S. Rep. No. 76, 89th Cong., 1st Sess. (1965).

American government, as to its scope if it is to be accepted beyond bilateral boundary, bridge, or extradition agreements, and as to the validity of the Multistate Tax Compact, in particular.

If this Court should decide that the correct test under the Compact Clause is that of Mr. Justice Field, requiring Congressional consent only if a compact interferes with the interest of other states or the federal government, this case still merits plenary consideration. A compact designed to transform interstate taxation cannot escape affecting the non-party states and the national interest, so as to be invalid in the absence of congressional approval. Moreover, Congress, and not a federal district court, should decide whether the Multistate Tax Compact unduly increases the political power of the confederating states or interferes with the national interest. Felix Frankfurter and James M. Landis noted that the considerations which led this Court to leave to Congress what constitutes a republican form of government are equally controlling in letting Congress circumscribe the area of agreement open to the states.[11] The opinion of a district court on motion

[11] Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925). *See also West Virginia ex rel. Dyer* v. *Sims, supra*, in which Justice Frankfurter stated (341 U.S. at 27): "Indeed, so awkward and unsatisfactory is the available litigious solution for these problems that this Court deemed it appropriate to emphasize the practical constitutional alternative provided by the Compact Clause. Experience led us to suggest that a problem such as that involved here is more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however consttituted." *See generally Developments in the Law: Federal Limitations on State Taxation of Interstate Business*, 75 HARV. L. REV. 953 (1962), which discusses the difficulties the courts would have in evaluating the consequence for interstate commerce of various interstate taxing schemes.

for summary judgment should not be allowed to stand as a major precedent in this area.

The substantiality of the questions presented is not diminished because the member states may do individually much of what is accomplished by Compact and Commission. The Constitution has balanced the conflicting demands of state sovereignty and federalism by permitting the states to act individually without the advance approval of Congress. Where the states proceed by "Agreement or Compact," however, the Constitution requires the advance consent of Congress. Individual action does not produce an on-going, independent body like the Multistate Tax Commission, not directly responsive to any electoral body, nor does reciprocal legislation grant state officials extensive extraterritorial powers. Continuing collective action presents a greater potential threat to those states not party to the confederation, and to federal supremacy. A multistate compact is inevitably an arrangement with power, quite distinguishable from individual state action, and the one place, one time bilateral agreements involved in *Virginia* v. *Tennessee* and *New Hampshire* v. *Maine*.

It is also no answer to note the purely "advisory" capacity of the Multistate Tax Commission, nor to emphasize that the member states may withdraw from the Compact at any time. To the extent the members take the advice, and to the extent they do not withdraw, a compact exists which requires the consent of Congress. As has been mentioned, all the member states have adopted Article VIII, giving the Commission the power to conduct multistate audits. The Annual Re-

ports of the Commission reveal that numerous multistate audits have been conducted, involving as many as thirteen states in one joint audit. By 1975, eight of the member states had adopted the regulations of the Commission calling for combined reporting and full apportionment of non-business income, and the Commission expects five more states to approve the rule before the end of 1976. Moreover, multistate audits conducted pursuant to these regulations have been accepted by states which have not adopted the regulations. Thus, despite some language characterizing the Compact as advisory and voluntary, the actions of the Commission and member states and the overall language of the Compact make it clear that the Compact and the Commission have momentum, and that they are transforming the interstate taxation system. This results from an "Agreement or Compact". It is important that this Court should itself determine whether such a far-reaching compact is one which requires the consent of Congress.

B. The Effect on States Not Party to the Compact

Plenary consideration of the validity of the Multistate Tax Compact is particularly important in light of the actual political and economic consequences of the Compact. The members of the Compact are primarily western states, and no major eastern, industrial state is now a member. Illinois withdrew as a full member recently, and New York severed its associate affiliation in 1971. New York feared a loss of sovereignty to the Multistate Tax Commission, which exercises continuous power uncontrolled by any one state.[12] Opposition

[12] *See* the discussion, and the letter of former Governor Rockefeller, at P-H State and Local Taxes, All States Unit ¶ 6612. *See also* Sharpe, *State Taxation of Inter-State Business and the*

is not confined to the eastern or industrial states, however. Florida withdrew as a member effective October 1, 1976. Arizona strongly opposes the Commission, considering it essentially a fourth level of government. Wisconsin also opposes the Commission, seeing it as a threat to the sovereignty of the states.[13] Alabama has agreed to join only if congressional review and approval can be obtained. In all, twenty-seven states have resisted joining the Compact since it was drafted ten years ago, and two states have abandoned their membership.

The Multistate Tax Commission has adopted rules and practices which call for the use of "combined reporting" and the "unitary business" concept." Under

Multistate Tax Compact: The Search for a Delicate Uniformity, 11 Col. J. Law & Soc. Problems 231 (1975).

[13] See Sharpe, *supra* note 12, citing a letter to the author from the Chairman of the Arizona State Tax Commission and testimony of the Wisconsin Tax Administrator before the staff of United States Senate Finance Subcommittee on Interstate Taxation in 1973.

[14] *See* the explanation of the Executive Director of the Multistate Tax Commission, Eugene Corrigan, at Corrigan, *Interstate Corporate Income Taxation—Recent Revolutions and a Modern Response*, 29 Vand. L. Rev. 423 (1976) and the explanation of the Audit Coordinator of the Commission, Frederick Cappetta, at Cappetta, *Joint Audit Program of the Multistate Tax Commission*, 33 Inst. on Fed. Tax. (N.Y.U.) 961 (1975). *See also* the articles extolling this method of taxation published in the Multistate Tax Commission Seventh Annual Report, 1974, and the frequent discussion of combined reporting and full apportionment in other Annual Reports.

This Court first dealt with this method of taxation in *Butler Bros.* v. *McColgan*, 315 U.S. 501 (1942). The Court declined to analyze both the apportionment formula involved and the potential for multiple taxation, and instead upheld the tax by requiring a multistate corporation attacking a state taxation system to prove by clear and cogent evidence that the tax results in multiple taxation.

these regulations, a taxpayer and its affiliated corporations (whether or not the latter are subject to the states' tax jurisdiction) are required to file a tax return reporting the entire net income of the whole group. This "combined" income is then apportioned under a formula based on property, payroll and sales, and a tax is levied without regard to whether the income being taxed was earned by a taxpayer subject to the jurisdiction of the state. This method of taxation may produce duplicate or multiple taxation, but its use has heretofore been confined to a few states.[15]

During discovery, appellants ascertained that the Commission has used combined reporting in dozens of audits, involving large sums of money. If the concept is adopted throughout the western United States, gross unfairness in interstate taxation can be avoided only through the efforts of some coordinating body. Mr. Corrigan has stated that his Commission is the only such body capable of mitigating the probability of mul-

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[15] See the discussion in Sharpe, *supra* note 12. Recent editions of the Multistate Tax Commission Annual Reports have recognized the multiple taxation problems. The potential multiple taxation inherent in the unitary business and combined reporting concepts has also been criticized in Congress. *See, e.g.*, H.R. Rep. No. 1480, 88th Cong., 2d Sess., Vols. 1 and 2 (1964); H.R. Rep. No. 565, 89th Cong., 1st Sess., Vol. 3 (1965); H.R. Rep. No. 952, 89th Cong., 1st Sess., Vol. 4 (1965). *See also* the following bills: H.R. 11798, 89th Cong., 2d Sess. (1966); H.R. 1538, 92d Cong., 1st Sess. (1971); S. 317, 92d Cong., 1st Sess. (1971); H.R. 977, 93d Cong., 1st Sess. (1973); H.R. 9, 94th Cong., 1st Sess. (1975); S. 2080, 94th Cong., 1st Sess. (1975), *and* HEARINGS BEFORE THE SUBCOMMITTEE ON STATE TAXATION OF INTERSTATE COMMERCE OF THE SENATE COMMITTEE ON FINANCE, 93d Cong., 1st Sess. (1973). The Multistate Tax Commission has opposed many of these bills. Multistate Tax Commission Annual Reports, 1968-1975.

tiple taxation.[16] The non-Compact states are thus being pressured to join the Compact, and interstate business is unfairly taxed in the interim while the non-Compact states exercise their sovereign right to resist such pressure. The Director of the Multistate Tax Commission has indicated that members of Congress and the Treasury Department are opposed to combined reporting.[17]

The Commission has also issued regulations eliminating the distinction between business and non-business income.[18] Traditionally, non-business income, such as rents, interest, and dividends on investments, is allocated to the state of commercial domicile. The Commission, however, apportions such revenue among all

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[16] Multistate Tax Commission Seventh Annual Report, 1974, at 50, *and* Corrigan, *supra* note 14, at 441-2.

[17] Corrigan, *supra* note 14, at 441. *See, e.g.*, S. 317, 92 Cong., 1st Sess. (1971) which would have prohibited combined reporting generally. S. 2080, 94 Cong., 1st Sess. (1975) would preclude worldwide combination. In 1976, the Task Force on Foreign Income of the House Committee on Ways and Means recommended that the Internal Revenue Code be amended to prohibit inclusion of foreign corporations in a combined report. The new income tax treaty between the United States and the United Kingdom, signed December 31, 1975, bans use of the unitary business and combined reporting concepts between the two countries when a United Kingdom parent company is involved. A protocol amending the treaty was announced September 2, 1976, but the ban on the use of the unitary business concept and combination reporting was not changed. The treaty has been sent to the Senate for its advice and consent. *See* 2 CCH TAX TREATIES ¶ 8103A.

[18] These regulations were adopted September 19, 1971 pursuant to article IV, and revised on February 21, 1973. *See* the explanation of the General Counsel of the Multistate Tax Commission in Dexter, *Taxation of Income from Intangibles of Multistate-Multinational Corporations*, 29 VAND. L. REV. 401 (1976). *See also* the articles cited *supra* note 14.

member states in which the business is present, either increasing the tax burden on interstate businesses, through multiple taxation of the same income, or depriving commercial centers like New York, Massachusetts, Pennsylvania, Ohio, and Illinois of revenue to which they have a legitimate, or at least, a traditional claim. If such commercial centers do not generally tax the non-business income allocated to them under traditional systems because they desire to attract business, as is the policy of New York, Pennsylvania and Massachusetts, the Multistate Tax Commission deprives them of this tax incentive. The Commission admitted in discovery that it had conducted multistate audits in which the traditional allocation of non-business income was eliminated.

Finally, the Commission does not allocate income under its regulations and practice to a state which does not tax such income. This "nowhere income," as it is called by Mr. Corrigan, is instead apportioned so as to be taxed,[19] again increasing the costs of interstate business and negating the decision of a sister state to stimulate its economy through tax incentives.

Such economic actions, taken on a regional basis, can be the source of conflict. A substantial question is presented as to whether Congress should approve the Multistate Tax Compact, and the Commission created by it, before it is allowed to pursue its economic and political policies.[20]

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[19] *See* Corrigan, *supra* note 14; Dexter, *supra* note 18.

[20] The manner of adopting the regulations requiring combined reporting and full apportionment of non-business income illustrates the difference between uniform legislation and a multistate agreement, and reveals the dangers presented by a regional body un-

C. Effect of the Compact on the National Interest

The Multistate Compact interferes with the national interest in promoting low cost, efficient interstate business. The methods of determining the tax due used by the Multistate Tax Commission may result in dupulicate or multiple taxation, and the existence of the Compact and Commission produce additional expense and complexity in interstate taxation. The operations of the Commission and its apportionment regulations confirm that one of the purposes of the party states is to disregard their substantive tax laws so as to create an illusion of uniformity among the states and thus head off federal legislation. The Multistate Tax Compact was drafted when federal legislation on state taxation of interstate commerce was under active consideration in both Houses of Congress,[21] and the Executive Direc-

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checked by any one state and operating without the approval of Congress. The adoption and utilization of the regulations also belie the Commission's characterization of its role as "advisory". The Uniform Division for Income Tax Purposes Act ("UDITPA"), 7 Uniform Laws Annotated 365 (1970), a model statute adopted by many Compact and non-Compact states, does not call for combined reporting and specifically preserves the distinction between business and non-business income. Rather than seek amendments to the law in those Compact states where UDITPA had been enacted, the Commission instead issued "advisory" regulations which negated important sections of this Act. The Commission then subjected multistate businesses to "advisory" audits under its own regulations. Its tax "recommendations" were then often accepted by the executive officials in charge of taxation in the various states, even in those states in which legislative representatives had adopted UDITPA and not the Commission's regulations. Commission representatives have indicated that the regulations are inconsistent with UDITPA and reflect the Commission's own view of the proper method of taxing interstate commerce, and not the system enacted by a majority of the states through UDITPA. *See* Dexter, *supra* note 18.

[21] *See* H.R. 11798 and H.R. 16491, 89th Cong., 2d Sess. (1966).

tor of the Multistate Tax Commission has said that one of the original purposes of the Compact was "simply killing congressional action in this field."[22] Congress has already regulated, and is considering further regulation of interstate taxation.[23] Congressional Committees have recognized the cost and confusion of letting the states control interstate tax law, and have acknowledged the need for uniformity.[24] The methods of the Commission are contrary to those embodied in bills proposed in Congress after lengthy study of interstate taxation by Congressional Committees.[25] In ad-

[22] *See* Mr. Corrigan's statements in *Taxation of Interstate Business*, PROCEEDINGS OF TAX FOUNDATION SEMINAR (April 16-17, 1970), p. 17. *See also* Multistate Tax Commission First Annual Report, 1968.

As indicated at p. 5, *supra*, P.L. 86-272, 73 Stat. 555 (1959), 15 U.S.C. §§ 381-4, was passed after the Court's decision in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959). P.L. 86-272 established minimum jurisdictional standards for state taxation, and directed that a Congressional study of interstate taxation be made. This study resulted in a lengthy report highly critical of the states' handling of multistate taxation. Accordingly, bills were introduced to extend federal control in this area. It was in response to this development that the states convened to draft the Multistate Tax Compact. The citations for the report and legislative proposals are listed *infra* note 25.

[23] *See, e.g.*, P.L. 86-272, 73 Stat. 555, 15 U.S.C. §§ 381-4 and legislative action cited *infra* at note 25.

[24] *See* H.R. Rep. No. 1480, 88th Cong., 2d Sess., Vol. 1 (1964); H.R. Rep. No. 952, 89th Cong., 1st Sess., Vol. 4 (1965). *See also* the observations of Mr. Justice Frankfurter in *Northwestern States Portland Cement Co.* v. *Minnesota, supra*, 358 U.S. at 476-477 (dissenting opinion).

[25] *See e.g.*, H.R. Rep. No. 1480, 88th Cong., 2d Sess., Vols. 1 and 2 (1964); H.R. Rep. No. 565, 89th Cong., 1st Sess., Vol. 3 (1965); H.R. Rep. No. 952, 89th Cong., 1st Sess., Vol. 4 (1965). *See also* the following bills: H.R. 11798, 89th Cong., 2d Sess. (1966); S. 317, 92d Cong., 1st Sess. (1971); H.R. 1538, 92d Cong., 1st Sess.

dition, several states have called for federal laws to insure a level of uniformity in State and local law and practice, and reduce the risk of multiple taxation.[26] A determination of the validity of the system the Compact seeks to establish in the United States is particularly important in light of the subject matter of the Compact. The power to tax can be the power to destroy, but should not be while this Court sits, and in the silence of Congress.[27]

The Compact and Commission also interfere in the conduct of foreign affairs. Before appellants' discovery was terminated by the action of the court below, it was learned that the Commission has combined world-

(1971); H.R. 977, 93d Cong., 1st Sess. (1973); S. 1245, 93d Cong., 1st Sess. (1973); H.R. 9, 94th Cong., 1st Sess. (1975); S. 2080, 94th Cong., 1st Sess. (1975). *See also* HEARINGS BEFORE THE SUBCOMMITTEE ON FINANCE, 93d Cong., 1st Sess. (1973). The Annual Reports of the Multistate Tax Commission reveal that the Commission has vigorously opposed passage of any federal act that could solve the difficult problems inherent in interstate taxation.

[26] *See, e.g.*, the statement of the Chairman of the New York State Department of Taxation and Finance, the statement of the Assistant Attorney General of Florida, and the statement of the Chairman of the Arizona State Tax Commission *in* HEARING BEFORE THE SUBCOMMITTEE ON STATE TAXATION OF INTERSTATE COMMERCE OF THE SENATE COMMITTEE ON FINANCE, 93d Cong., 1st Sess. (1973), at 133, 367, 393.

[27] *See McCulloch* v. *Maryland*, 4 Wheaton 316, 413 (1919); *Panhandle Oil Company* v. *Mississippi ex rel.* Knox, 277 U.S. 218, 223 (1928) (dissenting opinion of Justice Holmes).

The District Court tested appellants' arguments that the Compact affects an area of federal concern against the standards of the Commerce Clause. Of course, if the Compact Clause is to have any meaning, the effect of a compact on the national interest in efficient interstate commerce need not constitute a violation of the Commerce Clause before the consent of Congress is required. *See, e.g.*, *Wharton* v. *Wise, supra*, 153 U.S. at 171.

wide income and apportioned it to some of the Compact states. The United Kingdom sought protection from this state practice in its latest tax treaty negotiations with the United States. The Treasury Department has also received numerous requests from other nations seeking protection from combined reporting.[23] Overlapping international claims to portions of the same tax base will lead to multiple taxation unless the foreign government recognizes the legitimacy of the income reallocation imposed by the Commission, and allows the taxpayer correlatively to reduce its income or its local tax liability. It is doubtful, however, that a foreign government will so defer to the Multistate Tax Commission. The foreign government may justifiably believe that its arm's length standard is more objective than the unitary business concept. The foreign government may also question the apportionment methods unilaterally chosen by a region of the United States. Finally, the Commission "recommends" taxation of world-wide income without regard to restrictions on currency repatriation and exchange revaluations, and without considering that such income may be taxed again when paid in dividends. The practices of the Commission should not be considered valid until Congress has consulted the State Department, Treasury Department, and other agencies to determine if such practices are in the national interest, and has then acted affirmatively to approve the Compact.

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[23] *See* Report of the Department of State to the President, June 8, 1976: "This method of assessment, which includes the burden of producing worldwide records of all of the affiliated companies, has raised many objections by our treaty partners and we are now seeking to deal specifically with this problem in our treaties." CCH Tax Treaties ¶ 8103 EE.

II. THE COMMERCE CLAUSE

A. The Burdens on Interstate Commerce

The Multistate Tax Compact also unreasonably burdens interstate commerce. The Compact, and the Commission created under it, produce confusion, inefficiency, inconsistent tax determinations, and multiple taxation. Standards for compliance are unclear, and remedies inadequate. Determining what constitutes a "unitary business," for example, is extremely difficult. No objective standards exist, and the very broad definition advanced by the Commission creates a serious potential for misallocation. The more attenuated the interdependence between the taxpayer and the income and assets of the rest of the group, the greater the risk of improperly allocating to a certain state or country income earned in another. If a narrower definition is attempted, administrability is diminished and expense increased as more and more frequent resort is made to case by case determinations.

The cost of compliance and enforcement is further exacerbated by the fact that a taxpayer must file data concerning not only its own operation, but also data concerning sales, payrolls, and properties of legally separate corporations, including those organized and operated in foreign countries. The cost to the taxpayer of obtaining and processing the data of a large multistate or multinational organization in order to determine the taxable income of one small part of the organization may be excessive, particularly when different accounting systems are used in other states or abroad. Moreover, there is some question as to whether the Commission can compel an unwilling affiliate to produce its records from other states or nations.

The "voluntary" and "advisory" arrangements characteristic of the Compact and Commission also unreasonably burden interstate commerce, creating another layer of cost and complexity in interstate taxation and hindering the effort to foster a national common market through inexpensive and efficient interstate business. Since no state can be bound by the results of an interstate audit which it considers unfavorable, a multistate business may be forced to submit to a state audit after absorbing the expense of an audit by the Commission. If several states accept the result of an audit conducted by the Commission, and the taxpayer objects, the only remedy lies in the separate administrative or judicial tribunals of each state. Further, review of an acceptance or rejection of a Commission audit by such tribunals will not bind the other states. It is thus entirely possible that an interstate business would be forced to litigate the results of an interstate audit in all twenty-one allied states.

The interstate audit will be conducted in the first place pursuant to both, or either, the Commission's advisory regulations (as adopted or not by the member states) and the laws of the member states. It is not surprising that multistate taxpayers question the fairness or accuracy of such audits. Although separate suits could perhaps correct these problems after they occur, or Congress could correct them legislatively after occurrence, the clear violation of the Commerce Clause inherent in such actions is further reason for this Court to review the decisions below before grave harm to the national interest is done.

III. FOURTEENTH AMENDMENT

As discussed more fully above, the system of taxation established by the Multistate Tax Compact contains unclear and inconsistent standard for compliance, and prescribes remedies that are costly, inefficient, and inadequate. Taxes may be imposed by state officials under "advisory" regulations not adopted by the taxing state, and perhaps even in conflict with the laws of the state. When this is done on a multistate basis, under the influence of the Compact, taxes assessed by the member states may violate the Due Process guarantee of the Fourteenth Amendment. The Commission's broad definition of a "unitary business" may also violate Due Process.[20] The confusion and expense produced by the enactment of the Compact and its operation through regulations and audit practices, to which Congress has not given its consent, requires this Court to review the validity of the Compact before the guarantees of the Fourteenth Amendment are ignored on a wholesale and concerted basis.

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[20] *See Hans Rees' & Sons* v. *North Carolina*, 283 U.S. 123 (1931): Mr. Corrigan believes that affiliates not subject to the jurisdiction of a particular state may nevertheless be taxed by that state under combined reporting and the unitary business concept, stating particularly that jurisdiction is "irrelevant." *See* Corrigan, *supra* note 14, at 440.

CONCLUSION

The questions presented by this appeal are substantial and require decision by this Court. Probable jurisdiction should be noted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-635

UNITED STATES STEEL CORPORATION, *et al.*, on Behalf of Themselves and All Persons Similarly Situated,

Appellants,

v.

MULTISTATE TAX COMMISSION, *et al.*,

Appellees.

On Appeal from the United States District Court for the Southern District Court of New York

APPENDICES A-F

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APPENDIX A

THE OPINION OF THE THREE-JUDGE COURT

Memorandum Decision and Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 CIV. 3438-CLB

UNITED STATES STEEL CORPORATION, STANDARD BRANDS INCORPORATED, GENERAL MILLS, INC., and THE PROCTER & GAMBLE DISTRIBUTING COMPANY, on behalf of themselves and all persons similarly situated,

Plaintiffs,

and

BRISTOL-MYERS CO., ELTRA CORPORATION, GOODYEAR TIRE AND RUBBER COMPANY, GREEN GIANT COMPANY, INTERNATIONAL HARVESTER COMPANY, INTERNATIONAL PAPER COMPANY, INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, McGRAW-HILL, INC., N.L. INDUSTRIES, INC. and UNION CARBIDE CORPORATION,

Intervenor-Plaintiffs,

against

MULTISTATE TAX COMMISSION, EUGENE F. CORRIGAN, Executive Director, Multistate Tax Commission, and ERIC E. WOHLFORTH (Alaska), RICHARD HEATH (Arkansas), JOHN H. HECKERS (Colorado), J. ED. STRAUGHN (Florida), RALPH W. KONDO (Hawaii), EWING H. LITTLE (Idaho), JAS. O. MATHIS (Indiana), JAMES T. McDONALD (Kansas), ALLISON GREEN (Michigan), JAMES SCHAFFNER (Missouri), J. MORLEY COOPER (Montana), WM. E. PETERS (Nebraska), JOHN J. SHEEHAN (Nevada), FRED L. O'CHESKEY (New Mexico), BRYON L. DORGAN (North Dakota), CHARLES H. MACK (Oregon), ROBERT F. CALVERT (Texas), VERNON L. HOLMAN (Utah), GEORGE KINNEAR (Washington) and E. S. MACCLEAN (Wyoming), all Commissioners of the Multistate Tax Commission from their respective states,

Defendants.

Before MESKILL, C.J., WEINFELD and BRIEANT, D.J.

Brieant, J.

The plaintiff corporations, on behalf of themselves and all multistate taxpayers who have been or may be threat-

ened with interstate audits by the defendant Multistate Tax Commission, seek a declaratory judgment that the Multistate Tax Compact [Prentice Hall State & Local Tax Service (All States Unit) ¶6310, *et seq.*] is invalid under the United States Constitution, and a permanent injunction barring its operation and enforcement. Subject matter jurisdiction exists pursuant to 28 U.S.C. §§1331, 1332 and 1343(3).

Defendants moved, pursuant to Rule 56, F.R.Civ.P., for summary judgment, which motion was heard before this statutory court convened pursuant to 28 U.S.C. §2281.

Familiarity with the decision of Judge Tenney of this Court, denying defendants' motion to dismiss the complaint, is assumed. 367 F.Supp. 107 (S.D.N.Y. 1973). By a memorandum and order dated February 5, 1974, Judge Tenney granted a motion by various multistate corporations for leave to intervene as plaintiffs, pursuant to Rule 24(b), F.R. Civ.P.[1] The Court further ordered that this suit proceed as a class action with plaintiffs and intervenor-plaintiffs as class representatives.[2]

---

1. Prior to argument of this motion, International Business Machines Corp. and Xerox Corporation withdrew as intervenor-plaintiffs and class representatives, although they remain members of the plaintiffs' class.

2. The terms "multistate taxpayer", or "multistate corporation" as referred to herein comprise those businesses which are engaged in interstate commerce and also are "present" in more than one state for purposes of such state and local taxes as income, capital stock, gross receipts, sales, or use taxes. The Multistate Tax Commission and the Compact which created it seeks to improve the administration and expedite the audit and collection of such taxes against non-resident businesses lawfully subject to such taxes. It does not of itself impose any tax, nor withdraw from any taxpayer any procedural right to contest a tax assessment.

Plaintiffs contend initially, that upon this record, summary judgment would be inappropriate. They claim that genuine issues exist as to material facts, and assert that their constitutional objections are addressed not only to the Compact itself, but to its operative effects as well. Plaintiffs argue that there must be further discovery before adjudication of these issues. Alternatively, they assert that if summary judgment is appropriate, it should be granted in their favor.

No contention is made that the compact is being administered other than according to its terms, except as to particulars governed by the substantive tax law of the respective party states. The constitutional issues posed by this complaint reduce themselves to questions of law.

Certain of the issues of fact which plaintiffs would seek to raise are purely hypothetical and speculative. As to these issues, plaintiffs have not "set forth specific facts showing that there is a genuine issue for trial." Rule 56 (e), F.R.Civ.P. Certain other claimed issues of fact are plainly not material to the determination of the merits of the constitutional arguments raised here, although they may be of academic interest to the various states in determining whether to join or continue membership in the Compact.

This litigation commenced with the filing of a complaint on August 11, 1972. In October 1973, plaintiffs served their first voluminous set of interrogatories. Since that time, the parties have litigated their respective discovery rights and evidentiary objections. Plaintiffs served a second voluminous set of interrogatories and again the defendants objected. Related cases in various state courts have been stayed pending determination of the issues raised in this

suit. Also, there are three related actions pending in other federal district courts. The Judicial Panel on Multidistrict Litigation, by order filed on February 5, 1976, deferred consideration of consolidation and transfer of these cases, pursuant to 28 U.S.C. §1407, pending disposition of this motion.

The amended complaint seeks declaratory and injunctive relief. Rule 57, F.R.Civ.P., provides that "[t]he Court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar." Members of the plaintiffs' class and defendants appear to be prejudiced by the continued operation of the Commission amidst these charges of illegality and constitutional invalidity. For these reasons, and the already prolonged period of time since issue was joined, additional delay for further discovery is unwarranted. Since we find no genuine issues of material fact, summary judgment is appropriate here.

When the amended complaint was filed on January 10, 1973, twenty-one states were signatories to this Compact.[3]

3. When the complaint was filed, the twenty-one member states were Alaska, Arkansas, Colorado, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, Texas, Utah, Washington and Wyoming. Although its Tax Commissioner was not named as a defendant in this action, and no reference has been made to its membership, Alabama apparently has become a party to the Compact, Code of Alabama, tit. 51, §919, and has adopted Article VIII of the Compact by statute, §924.

On August 29, 1975, Illinois withdrew from the Compact. California became a member of the Compact on January 1, 1976. The enabling legislation by which California became a member state was contingent, *inter alia*, upon the Commission adopting a by-law requiring that matters voted upon by the Commission receive for approval a majority vote of the number of member states and a majority of the states weighted as to total population based upon the current United States Statistical Abstract. See West's Cal. Revenue and Taxation Code §38001 (Supp. 1976), notes relating to Cal. Stats. 1974, c.93.

The individual defendants in this action are the Executive Director of the Commission and the tax administrators of the twenty-one respective states, who then served as members of the Commission.

The stated purposes of the Compact are to:

> "1. Facilitate proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.
>
> 2. Promote uniformity or compatibility in significant components of tax systems.
>
> 3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.
>
> 4. Avoid duplicative taxation."

Article III, §1 permits multistate taxpayers to elect to apportion and allocate their income in accordance with the provisions of the Uniform Division of Income for Tax Purposes Act ("UDITPA"),[4] as embodied in Article IV of the Compact or in accordance with otherwise applicable state law. Article III, §2 requires each party state which imposes an income tax to allow smaller taxpayers meeting certain requirements to file a short form return and compute the in-

4. The Uniform Division of Income for Tax Purposes Act ("UDITPA") is a major feature of the Compact and is adopted by those states becoming members of the Compact. UDITPA is not the creation of this Compact, rather it was approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in 1957. Several of the Compact's member states had adopted UDITPA prior to promulgation of the Compact. In addition, UDITPA is in effect in Kentucky and South Carolina, neither of which are members of the Compact. See 7 Uniform Laws Annotated 365 (1970), 258 (Supp. 1976).

come tax due based upon the percentage of their gross sales within the taxing state.

Article V grants purchasers a tax credit for use taxes, in the amount of sales and use taxes previously paid to other states and their subdivisions. This article also recognizes the validity of exemption certificates issued by other states and their subdivisions.

Article VI establishes the Commission and provides for its membership, voting rights, officers, committees and finances. Article VI, §1(g) authorizes the Executive Director of the Commission to appoint and discharge personnel "[i]rrespective of the civil service, personnel or other merit system laws of any party State"; and §1(h) authorizes the Commission to "borrow, accept or contract for the services of personnel from any . . . governmental entity." Section 3 empowers the Commission, in addition to powers conferred elsewhere in the Compact, to:

> "(a) Study State and local law tax systems and particular types of State and local taxes.
>
> (b) Develop and recommend proposals for an increase in uniformity or compatibility of State and local tax laws with a view toward encouraging the simplification and improvement of State and local tax law and administration.
>
> (c) Compile and publish information as in its judgment would assist the party States in implementation of the compact and taxpayers in complying with State and local tax laws.
>
> (d) Do all things necessary and incidental to the administration of its functions pursuant to this compact."

Article VII provides that where two or more party states or their subdivisions have "uniform or similar" tax laws, the Commission may adopt uniform regulations and forms for their administration. Upon adoption by the Commission, the regulations are to be submitted to the appropriate officials of each state or subdivision for consideration and adoption in accordance with its own law.

Article VIII establishes procedures for interstate joint audits to be performed by the Commission on behalf of and at the request of member states. Article VIII is in force only in those states that specifically enact it by statute. Article VIII, §2 permits a member state to request the Commission to perform the audit with expenses to be borne by the requesting taxing authority.

Section 3 of Article VIII authorizes the Commission to require the attendance of witnesses to give testimony and produce records and documents. Section 4 grants the Commission the authority to:

> "apply to any court having power to issue compulsory process for orders in aid of its powers and responsibilities pursuant to this Article and any and all such courts shall have jurisdiction to issue such orders. Failure of any person to obey any such order shall be punishable as contempt of the issuing court. If the party or subject matter on account of which the Commission seeks an order is within the jurisdiction of the court to which application is made, such application may be to a court in the State or subdivision on behalf of which the audit is being made or a court in the State in which the object of the order being sought is situated. The provisions of this paragraph apply only to courts in a State that has adopted this Article."

Appendix A

Section 5 permits the Commission to decline to perform an interstate audit if the Commission's resources are insufficient, or if it appears otherwise impracticable. Section 5 further authorizes the Commission to make its audit information available to interested party taxing authorities, other than the taxing authority requesting the audit, if the additional interested parties participate in a manner satisfactory to the Commission.

Section 6 of Article VIII imposes a requirement of confidentiality and limits the dissemination of audit information to party states or their subdivisions and to the United States. This information is to be available "in accordance with the laws of the States or subdivisions on whose account the Commission performs the audit, and only through the appropriate agencies or officers of such States or subdivisions." Section 6 also prohibits the Commission from requiring a taxpayer to keep records for any period not otherwise required by law.

Article IX describes an arbitration procedure that the Commission may adopt by regulation "[w]henever the Commission finds a need for settling disputes concerning apportionments and allocations by arbitration."[5]

Article X governs the entry into force of the Compact and withdrawal of party states from the Compact. Any

5. The legislation that enabled California to become a member state expressly provided that California would not continue as a member if the Commission placed in effect the provisions of Article IX, whether the Commission acted voluntarily or under court order. See West's Revenue and Taxation Code §38001 (Supp. 1976), notes relating to Cal. Stats. 1974, c.93. We regard Article IX as being of no more than academic interest. Unless California changes its position, it is unlikely to be implemented, and we do not regard plaintiffs as threatened with its application. Any questions raised thereby had best be held for a future day.

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state may withdraw if it enacts a statute repealing the Compact.

Article XI provides that the Compact is not to be construed so as to:

> "(a) Affect the power of any State or subdivision thereof to fix rates of taxation, except that a party State shall be obligated to implement Article III 2 of this compact.
>
> • • •
>
> (c) Withdraw or limit the jurisdiction of any State or local court or administrative officer or body with respect to any person . . . corporation or other entity or subject matter, except to the extent that such jurisdiction is expressly conferred by or pursuant to this compact upon another agency or body.
>
> (d) Supersede or limit the jurisdiction of any court of the United States."

Article XII states a rule of liberal construction and of severability.

In *Kinnear* v. *The Hertz Corporation*, 545 P.2d 1186 (Wash. Sup. Ct. 1976) (*en banc*), the court was asked to hold, on grounds substantially similar to those advanced here, that Article VIII of the Multistate Tax Compact violated the United States Constitution. The court there affirmed a grant of summary judgment in favor of Kinnear, as Director of the Department of Revenue of the State of Washington, and the Multistate Tax Commission.

Plaintiffs contend that the entire Compact is invalid for want of Congressional approval as required by Article I,

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§10, clause 3 of the United States Constitution, which provides:

> "No State shall, without the Consent of the Congress . . . enter into any Agreement or Compact with another State, or with a foreign power. . . ."

Although absolute in its terms, the Compact Clause has not been construed as requiring Congressional approval of all interstate agreements. *Virginia* v. *Tennessee,* 148 U.S. 503 (1893) states the test applicable in determining whether a particular interstate agreement requires Congressional approval:

> "Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." 148 U.S. at 519.

In *Virginia* v. *Tennessee, supra,* the Court found that the boundary agreement there in issue had received Congressional approval. Although unnecessary to the determination of the issues in that case, the rule stated there has been accepted and followed as the test for the need for Congressional approval. The same test has been applied again most recently in *New Hampshire* v. *Maine,* 44 U.S.L.W. 4829, 4831 (U.S.S.C. June 14, 1976).

Both *Virginia* v. *Tennessee, supra,* and *New Hampshire* v. *Maine, supra,* involved agreements between neighboring states for the settlement of disputed state boundaries. The test which *Virginia* v. *Tennessee* establishes has been ap-

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plied in a variety of other contexts. In matters related to state taxation, this test has been applied in upholding the constitutionality of reciprocal legislation and interstate agreements governing tax exemptions and the exchange of tax record information. See, *e.g., Bode* v. *Barrett,* 412 Ill. 204, 107 N.E.2d 521 (1952), *aff'd.* 344 U.S. 583 (1953); *Dixie Wholesale Grocery Company* v. *Martin,* 278 Ky. 105, 129 S.W.2d 181, *cert. denied* 308 U.S. 609 (1939); *Roberts Tobacco Co.* v. *Department of Revenue,* 322 Mich. 519, 34 N.W. 2d 54 (1948).

Applying the test of *Virginia* v. *Tennessee* and *New Hampshire* v. *Maine, supra,* to the Compact here in issue, the Multistate Tax Compact does not increase the political power of the party states. The Commission is vested with no taxing authority; the taxes which it administers are only those imposed by the respective states and subdivisions in accordance with state law.

Nor does the Commission have legislative power; it may propose model regulations where two or more party states or their subdivisions have uniform or similar laws. Such proposals may be adopted, modified, or rejected by the duly authorized tax officials of the affected states.[6]

The Commission does have the power to conduct audits, but only at the request of a party state or its subdivision. In aid of this power, the Commission is authorized to seek the compulsory process of courts having jurisdiction within

6. Proposing model uniform legislation is a function performed by such organizations as the National Conference of Commissioners on Uniform State Laws, bar organizations and public interest groups. As with the proposals of such groups, the recommendation of the Commission may be persuasive, but the decision whether to enact the recommended legislation or regulations lies solely with those officials designated by each state's constitution and laws.

the party states. The Commission does not have the authority to enforce any tax liability; that, too, remains within the jurisdiction of the respective taxing authorities. Any grievance that a taxpayer may have with the results of a Commission audit or the tax liability resulting therefrom is justiciable in the taxing state in accordance with the same procedures governing the grievances of intrastate taxpayers.

Similarly, it is clear that the Compact does not encroach upon or interfere with federal supremacy. Although Congress may be constitutionally empowered by the Commerce Clause, Article I, §8, clause 3, to legislate and regulate the interstate administration of state tax systems, Congress has yet to exercise this power. Plainly, this failure to act has not preempted the states' powers in the field of multistate tax administration. Since the states may act individually in this area, there is no greater encroachment upon the federal interest by their acting cooperatively. Notwithstanding this Compact, Congress could enact comprehensive legislation that would preempt the power.

In *Virginia* v. *Tennessee, supra,* at 518, the Court observed that "[t]here are many matters upon which different states may agree that can in no respect concern the United States." Although the problems of multistate tax administration might be a concern of federal interest, that concern has not been evidenced by legislation in this area. As yet, there are no federal statutes or expressed Congressional policies with which this Compact could interfere. In the event of federal preemption in the future, defendants must withdraw *pro tanto* in order that any such federal statute shall be supreme.

Plaintiffs next contend that the Compact violates the Commerce Clause in several respects. Plaintiffs' first contention in this regard is that Congress, under its power to regulate interstate commerce, has preempted the field. As we noted previously regarding the issue of encroachment upon federal supremacy, there has been no such federal preemption. It is now established that

> ". . . federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained." *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 142 (1963).

See also *Merrill Lynch, &c.* v. *Ware,* 414 U.S. 117, 139 (1973). There is nothing inherent in the problems of multistate tax administration that would require federal regulation, nor has Congress yet identified these problems as a matter of peculiar federal concern.

Second, plaintiffs contend that the Compact imposes an undue and unreasonable burden upon interstate commerce.

> "It is a truism that the mere act of carrying on business in interstate commerce does not exempt a corporation from state taxation. 'It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business.' *Western Live Stock* v. *Bureau of Revenue,* 303 U.S. 250, 254 (1938)." *Colonial Pipeline Co.* v. *Traigle,* 421 U.S. 100, 108 (1975).

Indeed, plaintiffs do not contend that the Commerce Clause bars imposition of the respective state taxes which the Com-

mission is charged with administering for the benefit of member states. A necessary correlative of the power to impose taxes is the power to audit, and determine the tax liability properly for each taxpayer.

The stated purposes of this Compact, *supra,* are to promote uniformity among state tax systems, ease taxpayer compliance and minimize the risk of duplicative taxation of the multistate taxpayer. Plaintiffs contend that the Compact promotes disparity, not uniformity. In support of this contention, plaintiffs argue that the voluntary nature of Compact membership and the fact that only twenty-one states have joined necessarily limits its reach. Plaintiffs further argue that the advisory powers granted to the Commission are insufficient to override the differences in the substantive tax laws of the party states. Plaintiffs' characterization here of a compact binding only a loose and powerless confederation stands in sharp contrast to their simultaneous characterization of the Compact as intruding upon the federal supremacy and increasing the political power of the states. That the Compact may promise more than it has as yet achieved is no ground for finding unconstitutionality. The member states have ceded no sovereignty over tax matters to the Commission. The fact that the Compact might promote a consensus among party states on principles of allocation of revenues or other matters, does not create an impermissible burden upon interstate commerce. This is so for at least two reasons: first, even without the Compact, the states could enact parallel or uniform tax legislation, as has been done with UDITPA itself; and second, any agreement between two or more states to

observe an identical principle of state tax law diminishes the existing possibility of fifty disparate state tax results. In sum, we find no merit to the contention that the Compact is an unconstitutional burden upon interstate commerce.

Plaintiffs' next argument charges that the Compact discriminates against multistate taxpayers, and for that reason is invalid under the Commerce Clause, the Equal Protection Clause and the Due Process Clause. Specifically, they allege three areas of discriminatory treatment: first, that Commission auditors are not subject to the civil service requirements of the party states; second, that Commission auditors would not be subject to state criminal penalties for disclosure of confidential audit data; and third, that the subpoena powers of the Commission exceed those of the individual states and therefore exceed the subpoena powers to which intrastate taxpayers are subjected.

Plaintiffs contend that the difference in auditor qualifications discriminates against multistate taxpayers because Commission audits may be conducted by auditors who are not as knowledgeable about the substantive tax law of the particular state on whose behalf they are acting. The Compact authorizes the Executive Director to assemble a staff for the Commission from two sources: first, he is authorized to appoint personnel without regard to any state's civil service requirements; second, he is authorized to contract for the services of personnel from other governmental bodies who presumably would be subject to civil service requirements of the individual employer states. If the Executive Director contracts for the use of personnel from a particular state to participate in a joint audit for that

state, the taxpayer would have no grievance with regard to the qualifications of the auditor.

Although the Compact appears to create a distinction between the qualifications for Commission personnel charged with conducting multistate audits and those civil service auditors who perform similar audits of intrastate taxpayers, this distinction is of no consequence. Commission auditors, as well as their civil service counterparts, are charged with auditing taxpayers and fixing tax liability in accordance with the tax laws and regulations of the respective states. Each auditor is bound by the same law. If a taxpayer's liability is computed erroneously whether by a Commission auditor or by a state civil service auditor, the taxpayer is aggrieved and has recourse to all those remedies the taxing state provides. It is not a demonstrated principle that tax auditors having civil service status work with any greater or less diligence or ability than those who lack job tenure.

In *American Motorists Insurance Company* v. *Starnes*, 44 U.S.L.W. 4652 (U.S.S.C. May 19, 1976), the Court upheld a Texas statute that appeared to limit venue in suits against domestic corporations by requiring a preliminary venue hearing while denying foreign corporations any such hearing, thereby permitting greater latitude in suits against foreign corporations. In so holding, the Court stated:

> " '. . . [I]t is fundamental rights which the Fourteenth Amendment safeguards, and not the mere forum which a state may see proper to designate for the enforcement and protection of such rights. Given, therefore, a condition where fundamental rights are equally protected and preserved, it is impossible to say that the rights

> which are thus protected and preserved have been denied because the state has deemed best to provide for a trial in one forum or another. It is not, under any view, the mere tribunal into which a person is authorized to proceed by a state which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the state has provided equal laws prevail.' *Cincinnati St. Louis R. Co.* v. *Snell*, 193 U.S. 30, 36-37 (1904). We are not confined to the language of the statute under challenge in determining whether that statute has any discriminatory effect. Just as a statute nondiscriminatory on its face may be grossly discriminatory in its operation, . . . so may a statute discriminatory on its face be nondiscriminatory in operation." 44 U.S.L.W. at 4654.

Here, plaintiffs may be subjected to audits performed by different personnel. The different auditors are required to apply the same substantive tax law and errors are reviewable by the same tax appeal procedures. We find no merit to the plaintiffs' constitutional claim on this ground.

Plaintiffs next contend that Commission auditors might not be subjected to state criminal penalties imposed for disclosure of confidential audit data since any such criminal violation may occur under circumstances beyond the state's criminal jurisdiction. Article VIII, §6 provides that the "[a]vailability of information shall be in accordance with the law of the States or subdivisions on whose account the Commission performs the audit." As a result, Commission audit information would be publicly available only to the same extent as it would be had the taxing authority, requesting the Commission audit performed that audit itself. If state law bars disclosure of certain information under

particular circumstances, that prohibition would apply to Commission audit information under like circumstances. Whether the audit is performed by Commission auditors or state auditors, the prohibitions against disclosure are the same.

As taxpayers, plaintiffs are justifiably concerned with the confidentiality of audit information, but, as to these prohibitions against disclosure, plaintiffs are not subjected to discriminatory treatment. The enforcement of criminal sanctions is a concern of the public prosecutor, as to which these plaintiffs lack standing. Any discrimination in criminal penalties imposed on others, or whether others are subject to criminal penalties at all, would not prejudice these plaintiffs. We may, and do, assume that Commission auditors, acting as agents for the party states, will obey the laws of the states on whose behalf they are acting, and perform their duties honorably.

Plaintiffs next contend that the Compact discriminates against multistate taxpayers in that it vests in the Commission broader subpoena powers than those possessed by the individual states. Generally, a person or corporation subject to a state court's *in personam* process may be compelled to produce books and records in his custody and control, whether located within or without the court's jurisdiction. A corporation that is present in a state by reason of doing business there, and accordingly, amenable to taxation, is also subject to the *in personam* process of the taxing state's courts. *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945). Therefore, a multistate corporation may be required to produce its relevant books and records in any state in which it is present and therefore taxable.

The Commission's subpoena power is no broader than that of the party states. The Commission has no powers of subpoena or contempt apart from the powers of the state courts whose jurisdiction it invokes. Each party state asserting a claim of tax liability might subpoena such books and records as are necessary to determine the taxpayer's liability. The Commission is merely empowered to seek from the courts compulsory process to enable it to perform the same task in a coordinated fashion for the joint benefit of the requesting taxing authorities.[7]

Although we do not find the Commission's powers broader than those of the constituent states, to the extent that the Commission may be enabled to use its subpoena powers in ways in which no single state can, we find that this difference does not constitute an invidious discrimination against multistate taxpayers. Different and more complex problems are raised in the taxation of multistate and multinational corporations that are not encountered in the taxation of intrastate businesses. Specifically, multistate taxation raises the risk of duplicative taxation, and the problem of the proper allocation of tax bases among

7. This practice will be of benefit to multistate taxpayers. In these days of the computer, many multistate taxpayers, present in a number of states, tend to centralize their record keeping in one place, often remote from a taxing authority. Such a remote taxing authority can, under familiar constitutional principles, compel attendance before it of competent employees having knowledge, together with sufficient underlying documentation to permit spot check verification of the computerized data. Such personnel and records cannot be in more than one place at a time. Common sense dictates, therefore, that examinations should take place where the records are kept. The Compact was a common sense approach to solve the chaos which would result if taxpayer's personnel, or alternatively, state taxing authorities were required to spend most of their time on the road.

the several taxing jurisdictions, issues which do not arise where a business is subject to taxation in only one jurisdiction. The different treatment, if any, accorded multistate taxpayers by the Compact is a permissible legislative response to what is perceived as the different circumstances of the multistate taxpayer. See *Kahn* v. *Shevin*, 416 U.S. 351 (1974); *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973).

Plaintiffs' final contention is that the Compact, or that portion of the Compact relating to the production of books and records for joint audit purposes, violates the Fourth Amendment in that it compels them to disclose data to an extralegal and unlawfully constituted body, that is, the Multistate Tax Commission. We find no merit to this contention. For the reasons stated above, we find the Compact to be lawful, and the Compact's creature, the Commission, to be a lawfully constituted body.

Such other Fourth Amendment rights as may be asserted by the conclusory allegations of the amended complaint are not ripe for adjudication. The Fourth Amendment affords corporations some measure of protection against unreasonable search and seizure. A governmental body might, in a given case, violate those rights by an abuse of its subpoena power. Whether particular demands for the production of books and records are unreasonable can only be determined in the context of a demand for the production of particular records of a taxpayer for the purposes of a particular joint audit. The Commission must seek the process of a court to require production of books and records. Determination of whether a particular de-

mand is unreasonable is best reserved for litigation in the court issuing process in a given case. None of the representative plaintiffs here have been subpoenaed to produce documents.

Plaintiffs' prayer for relief is denied in all respects, and pursuant to Rule 58, F.R.Civ.P., the Clerk will enter judgment in favor of the defendant.

So Ordered.

Dated: New York, New York
July 8, 1976

/s/ THOMAS J. MESKILL

THOMAS J. MESKILL

/s/ EDWARD WEINFELD

EDWARD WEINFELD

/s/ CHARLES L. BRIEANT

CHARLES L. BRIEANT

APPENDIX B

THE DECISION OF JUDGE TENNEY, 367 F.SUPP. 107 (S.D.N.Y. 1973)

Appendix B

Memorandum

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 3438 (CHT)

UNITED STATES STEEL CORPORATION, *et al.*,

Plaintiffs,

against

MULTISTATE TAX COMMISSION, *et al.*,

Defendants.

TENNEY, J.

In the instant action defendants, not having filed an answer, move pursuant to Fed. R. Civ. P. 12 to vacate the service of the summons and complaint and to dismiss the action on the grounds that this court lacks jurisdiction over the subject matter of the action and the persons of the defendants, and that the complaint fails to state a claim upon which relief can be granted. For the reasons cited *infra*, the motions are denied in all respects.

Appendix B

I. Background

In response to the widespread recognition that, as applied to the multistate corporations which dominate the nation's economy, traditional state tax administration was inadequate, ineffective and excessively costly both to the states and to businesses, the Multistate Tax Compact (hereinafter the "Compact"), allegedly designed to achieve greater uniformity of state taxation of interstate business and to reduce double taxation, purportedly went into effect in its party states on August 4, 1967, after seven states had adopted it. (Art. X, §1 of Compact, Appendix A to Defs.' Brief in Support of Motion.) At present 21 states have adopted the Compact.[1]

The Compact established the defendant Multistate Tax Commission (hereinafter the "Commission") to administer its provisions. (Compact, Art. VI.) The Commission is composed of a member from each party state who generally is that state's chief administrator of the types of taxes to which the Compact applies;[2] each member, or

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1. These 21 states are: Alaska, Alas. Stat. §43.10.010; Arkansas, Ark. Stat. 1947, §84-4101; Colorado, Colo. Rev. Stat. 1963, Art. 74-14; Florida, Fla. Stat. Ann. §213.15; Hawaii, Hawaii Rev. Stat. §255-1; Idaho, Idaho Code. §63-3701; Illinois, Ill. Rev. Stat. §120-871; Indiana, Burns' Ind. Stat. Ann., §64-4464; Kansas, Kan. Stat. Ann. §79-4307; Michigan, Mich. Comp. Laws Ann. §205.588; Missouri, Mo. Rev. Stat., 1969 §32.200; Montana, Mont. Rev. Code 1947, §84-6701; Nebraska, Neb. Rev. Stat. 1943, §77-2901; Nevada, Nev. Rev. Stat. §376.060; New Mexico N.M. Stat. Ann. 1953, §72-15A-37, 44; North Dakota, N.D. Cent. Code, §57-59-08; Oregon, Ore. Rev. Stat. §305.675; Texas, Tex. Civil Stat., Art. 7359(a); Utah, Utah Code Ann. 1953, §59-22-1; Washington, Wash. Rev. Code Ann., §82.56; Wyoming, Wyo. Stat. 1957, §39-376.

2. The Compact deals primarily with state net income taxation of interstate businesses, but Article V of the Compact also deals with sales and use taxes.

Commissioner, is named as a defendant in the instant lawsuit. The Commission elects officers from among its members and appoints an Executive Director who is the Secretary and chief administrator of the Commission. At present, defendant Eugene Corrigan is Executive Director. The Commission has its headquarters in Boulder, Colorado, and is a citizen of the State of Colorado; it also maintains an office in Chicago and one in New York City.

Article VII of the Compact gives the Commission the power to adopt uniform regulations for the administration of tax laws which are uniform or similar in two or more party states and to prescribe uniform tax forms. The regulations adopted by the Commission are not binding upon the party states; each party state may individually consider such regulations for adoption in accordance with its own laws and procedures.

Before the Compact went into effect, the most serious problem in state corporate income tax law lay in the area of apportionment and allocation of the income of a multistate corporation to the states in which it is taxable. Article IV of the Compact seeks to alleviate this difficulty by allowing a multistate taxpayer to apportion and allocate its income under the apportionment formula and rules for specific allocation set forth in the Compact or by any other method available under state law. The Commission has adopted regulations dealing with the allocation and apportionment of income under Article IV. Plaintiffs state, however, that they believe only three party states (Oregon, Indiana and Alaska) had adopted any of these regulations as of December 31, 1972. (Pls.' Brief in Opp. at 13-14.)

Article III of the Compact provides that the party states will allow a "small taxpayer" (defined as one whose only activities within the taxing jurisdiction consist of sales and do not include owning or renting real estate or tangible personal property, and whose dollar volume of gross sales made during the tax year within the state or subdivision is not in excess of $100,000) to elect to pay a tax on its gross sales in lieu of the tax on net income. Not all party states have adopted the option and evidently several of those which have adopted it have not yet adopted a related tax rate.

Article IX allows the Commission, at the option of the taxpayer, to arbitrate disputes concerning apportionment and allocation but only with respect to a claim of double or multiple (but not over-) taxation. The arbitration procedure requires the adoption by the Commission of a regulation for it to become effective. No such regulation is in effect.

The most significant power of the Commission (and the real bone of contention between the parties) is its authority under Article VIII of the Compact to conduct "interstate audits" of multistate corporations. Such audits may relate to any tax or license fee imposed in whole or in part for revenue purposes. In general, the Commission may conduct audits upon the request and on the behalf of one or more states party to the Compact or it may itself offer to conduct an audit based upon its determination that such audit would be "of interest" to a number of party states. The Commission has broad subpoena power and the authority to seek court enforcement in connection with the

carrying out of its audit responsibilities. Article VIII is in force only in those party states which specifically have adopted it, 17 to date.[3]

Although several bills[4] have been introduced in Congress for the purpose of obtaining Congressional consent to the Compact, Congress has yet to act.

The impetus for the instant lawsuit was a demand by defendant Corrigan that plaintiffs submit to the audits provided for in Article VIII of the Compact. Plaintiffs challenge the constitutionality of the Compact on the grounds: (1) that the Compact, and, therefore, any audit demanded pursuant thereto, is invalid under the compact clause, Art. I, §10, Cl. 3, U.S. Const., because Congress has not given its consent; (2) that the Compact encroaches upon the power of Congress to regulate commerce among the several states under the commerce clause, Art. I, §8, U.S. Const., and imposes unreasonable burdens in interstate commerce; (3) that the Compact violates the due process and equal protection clauses of the fourteenth amendment; and (4) that the Compact violates the fourth amendment's proscription against unreasonable searches and seizures. Jurisdiction is alleged under 28 U.S.C. §§1331 (cases arising under the Constitution wherein the value in controversy exceeds $10,000), 1332 (diversity of citizenship), and 1343 (3) (deprivation under color of state law of rights secured to plaintiffs under the Constitution). The action is brought as a class action, seeks declaratory and injunctive relief, and requests the convening of a three-judge court under 28 U.S.C. §§2281 and 2284.

3. The 17 states are Alaska, Arkansas, Colorado, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Michigan, Nebraska, Nevada, New Mexico, North Dakota, Oregon, Texas and Washington. Arkansas' adoption of Article VIII is contingent upon a recommendation from that state's Commissioner of Revenue that it be made effective, and further contingent upon approval of the Governor.

4. *See* S. 3892, 89th Cong., 2d Sess. (1966); S. 883, S. 1551, H.R. 9476 and H.R. 13682, 90th Cong., 1st Sess. (1967); S. 1198, H.R. 6246 and H.R. 9873, 91st Cong., 1st Sess. (1969); S. 1883 and H.R. 6160, 92d Cong., 1st Sess. (1971); S. 3333, 92d Cong., 2d Sess. (1972).

II. Subject Matter Jurisdiction

A. Eleventh Amendment Immunity

Defendants, in support of their motion to dismiss, argue, first, that this court has no jurisdiction over the Commission *qua* commission on the ground that, because the Commission is an agency of states which have not consented to be sued, the eleventh amendment to the United States Constitution bars this action. The Court disagrees.

The eleventh amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

To say that a state agency is entitled to eleventh amendment immunity presupposes the constitutional validity of that agency. Where, as here, it is charged that the agency itself is constitutionally invalid, the eleventh amendment is no bar.

> "The Constitution of the United States, with the several amendments thereof, must be regarded as one

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instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate, if the immunity of the individual States from suits by citizens of other States, provided for in the Eleventh Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several States, *which forbid the States . . . without the consent of Congress, from . . . entering into any agreement or compact with other States* . . . which provisions existed before the adoption of the Eleventh Amendment, which still exist, and which would be nullified and made of no effect, if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations." *Prout* v. *Starr,* 188 U.S. 537, 543 (1903) (emphasis added).

Defendants' reliance on Port of New York Authority and Water Front Commission of New York Harbor cases, *Wolkstein* v. *Port of New York Authority,* 178 F. Supp. 209 (D.N.J. 1959); *Rao* v. *Port of New York Authority,* 122 F. Supp. 595 (E.D.N.Y. 1954), *aff'd per curiam,* 222 F.2d 362 (2d Cir. 1955); *Maroney* v. *Waterfront Commission of New York Harbor,* 52 Misc. 2d 424, 276 N.Y.S. 2d 362 (Sup. Ct. 1966); *Bush Terminal Co.* v. *City of New York,* 152 Misc. 144, 273 N.Y.S. 331 (Sup. Ct. 1934), *aff'd,* 256 App. Div. 978, 11 N.Y.S.2d 554 (1939), *aff'd,* 282 N.Y. 306, 26 N.E.2d 269 (1940), for the proposition that a commission established by multistate compact is entitled to eleventh amendment immunity is erroneous since in those cases, unlike the case *sub judice,* the compact establishing the authority or commission had been approved by Congress so that the compact's validity was not at issue.

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Even if there were no question of the constitutional validity of the Commission, the mere fact that an agency is a valid state agency would not automatically entitle it to eleventh amendment immunity as a matter of law. In each case, the facts must be closely scrutinized to determine whether the agency in question is, in effect, an arm or alter ego of the state so as to entitle it to immunity, *State Highway Commission* v. *Utah Construction Co.,* 278 U.S. 194 (1929); whether immunity has been expressly or impliedly waived, *Kennecott Copper Corp.* v. *Tax Comm'n,* 327 U.S. 573, 579-80 (1946); and whether the state is the real party in interest, *Smith* v. *Reeves,* 178 U.S. 436 (1900). No single factor is dispositive in determining whether state immunity attaches to any one of its agencies. *Pennsylvania Turnpike Commission* v. *Welsh,* 188 F.2d 447 (3d Cir. 1951).

With regard to the individual Commissioners as defendants, a suit against a state official is not considered a suit against the state in violation of the eleventh amendment where the actions of the official which are challenged (1) are beyond the authority granted him by a valid statute or (2) are performed pursuant to an unconstitutional statute. In both situations, relief can be granted without impleading the state because of the officer's lack of delegated power; the only difference betwen the first and second situations is that in the second "power has been conferred in form but the grant is lacking in substance because of its constitutional invalidity." *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 689-90 (1949). In the leading case of *Ex parte Young,* 209 U.S. 123 (1908), the Supreme court upheld a lower court's injunction against the Attorney General of Minnesota restraining him from enforcing a

state statute reducing railroad rates and providing severe penalties for any railroad which failed to comply. Plaintiffs charged that the new rates were unjust, unreasonable and confiscatory and would deprive the railroad companies of their property without due process of law. Over the Attorney General's objection that the suit was in fact a suit against the state in violation of the eleventh amendment, the Supreme Court held:

> "The . . . use of the name of the State to enforce an unconstitutional act to the injury of the complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official. . . . If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such an enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." *Id.* at 159-60.

In the instant case the defendant Commissioners are charged with acting under a constitutionally invalid state statute, *i.e.*, the statutes of the respective states adopting the Compact. That would seem to place them squarely within the *Young* doctrine. Defendants make the unique argument, however, that because the Commissioners cannot act singly, but only as a group (*i.e.*, the Commission acts only by majority vote of the Commissioners) this fact somehow removes them from the *Young* exception to eleventh amendment immunity. No authorities support such a proposition and defendants' assertion is contrary to cases ranging from *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362 (1894), where the individual railroad commissioners, as well as the railroad commission, were enjoined from enforcing illegal fixing of rates, through the modern civil rights cases such as *Wilgus* v. *Peterson*, 335 F. Supp. 1385, 1389 (D. Del. 1972). The cases cited by defendants in support of their argument—*Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945); *Great Northern Life Insurance Co.* v. *Read*, 322 U.S. 47 (1944); *O'Neill* v. *Early*, 208 F.2d 286, 288 (4th Cir. 1953)—are distinguishable. None of their holdings depended upon the fact that several state officials were named as defendants collectively, but, rather, were clearly based on the proposition that a suit to recover state treasury funds is barred by the eleventh amendment where the state has not consented to be sued. In the instant suit, however, plaintiffs seek declaratory and injunctive relief against the individual Commissioners, not a money judgment from the state.[5] Likewise, *Knight* v. *State of New York*, 443 F.2d 415 (2d Cir. 1971), cited by defendants, is inapposite. In that case plaintiff originally had brought suit against the State of New York seeking the return of property appropriated by the state. The state moved to dismiss and plaintiff moved to add as a defendant the state official involved. The state's motion was granted, and defendant's was denied. The Court of Appeals affirmed on the ground that at the time of suit, title had vested in the state and plaintiff's suit therefore would require affirmative ac-

5. *See Rothstein* v. *Wyman*, 467 F.2d 226, 238 (2d Cir. 1972), for a recent case enunciating this distinction.

tion by the state to return the property. In so holding, however, the court noted:

> "It is equally clear that, under the doctrine of Ex parte Young, . . . a person in Knight's position could have sued for an injunction in the federal courts, in advance of the taking, to restrain the commissioner from effecting the appropriation. . . ." *Id.* at 419.

As long as the individual Commissioners remain as commissioners they must be deemed to acquiesce in any action taken by the Commission and thus would be the proper parties to enjoin if a constitutional violation is found to have occurred.

B. The Tax Injunction Act of 1937, 28 U.S.C. §1341

Defendants contend that 28 U.S.C. §1341 bars plaintiffs from maintaining this lawsuit in federal district court. That section provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

In determining whether to exercise jurisdiction in a particular case, the Court must carefully weigh two countervailing considerations set forth by the statute: (1) a long standing policy of non-interference by federal courts in state tax matters; and (2) fairness to plaintiffs, *i.e.*, whether plaintiffs have an effective state remedy. "The cases construing [§1341] show that the broad language of the statute has been limited by numerous exceptions. . . ." *Builders & Developers Corp.* v. *Manassas Iron & Steel Co.*,

208 F. Supp. 485, 491 (D. Md. 1962). Under the terms of the statute itself, a federal court must decline jurisdiction only when the plaintiffs have a "plain, speedy and efficient remedy" in the state courts. Although the state remedy need not be "the best remedy available", *Bland* v. *McHann*, 463 F.2d 21, 29 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973), its existence will not bar federal relief where the state remedy is "unduly burdensome". *Georgia R.R. & Banking Co.* v. *Redwine*, 342 U.S. 299 (1952). The test is whether the state remedy is "adequate". *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602, 605 (1951); *Hillsborough* v. *Cromwell*, 326 U.S. 620, 624 (1946).

Defendants suggest that there are four methods by which plaintiffs can raise their constitutional claims in state court, any one of which is sufficiently "plain, speedy and efficient" to deprive this court of jurisdiction: (1) a suit for declaratory and injunctive relief in the courts of each of the 17 states which have adopted Article VIII of the Compact; (2) administrative review pursuant to statutes of each of the Compact states of the tax assessment imposed by each state after audit, followed by judicial review of the proposed administrative action in the courts of each of the member states; (3) interposition of their constitutional claims as a defense to subpoena enforcement actions brought either by a Commissioner *qua* commissioner or as agent for a Compact state requesting an audit; or (4) a suit in the Colorado state courts for declaratory and injunctive relief.

The first two suggested courses of action, and probably and third, share a common problem—multiplicity of suits; plaintiffs would have to bring at least 17 suits to obtain

the same relief that can be obtained in the federal courts via one lawsuit. The reference to "such state" in §1341 clearly indicates that the statute contemplated that the taxing authority of only one state would be involved and cannot mean that a taxpayer must resort to the courts of 17 states to obtain relief. It is not persuasive to argue, as defendants have in their brief, that the resulting multiplicity of actions "is nothing more nor less than the normal costs and burdens of conducting a multistate enterprise." (Defs.' Reply Brief at 8.) The test is whether the state remedy is "plain, speedy and efficient". The necessity for such a multiplicity of actions cannot by any stretch of the imagination be considered a viable alternative to federal suit, but rather, falls into the category of state remedies which are considered "unduly burdensome". *Georgia R.R. & Banking Co.* v. *Redwine, supra,* 342 U.S. 299.

This interpretation of the statute is supported by the case of *Matthews* v. *Rodgers,* 284 U.S. 521 (1932), cited by defendants. The Court in *Matthews* refused to grant plaintiff taxpayers an injunction against a state taxing authority where they had an adequate remedy under state law by paying the tax and suing for a refund. In particular, the Court held that the state remedy was adequate *precisely because* each taxpayer would only have to bring one suit to vindicate his rights as a taxpayer. The Court indicated, however, that federal equity jurisdiction would obtain if plaintiffs would have had to bring numerous suits to vindicate their rights:

> "In general, the jurisdiction of equity to avoid multiplicity of suits at law is restricted to cases where there would otherwise be some necessity for the maintenance of numerous suits between the same parties, involving the same issues of law and fact." *Id.* at 529-30.

Cases decided after the passage of the present version of §1341 have sustained federal jurisdiction where the alternative state remedy involved a multiplicity of suits. *See Georgia R.R. & Banking Co.* v. *Redwine, supra,* 342 U.S. 299; *Louisville & Nashville R.R.* v. *Public Service Commission,* 249 F. Supp. 894 (M.D. Tenn. 1966), *aff'd,* 389 F.2d 247 (7th Cir. 1968).

The first suggested course of action is also inadequate because it is doubtful whether plaintiffs could acquire *in personam* jurisdiction over the Commission and its Executive Director in Compact states where the Commission maintains no office and conducts no audits. With respect to state actions for declaratory judgments, some of the states in question have strict statutory provisions requiring joinder of interested parties before declaratory relief can be granted.[6] Moreover, most of the declaratory judgment statutes set forth in Appendix C to defendants' brief require that declaratory relief, if granted, terminate the controversy. In a situation where plaintiffs may not be able to obtain jurisdiction over the proper parties, the state declaratory judgment remedy can hardly be said to be adequate.

The second suggested course of action has another infirmity: because it is unavailable to plaintiffs until after the audits have been conducted, it might cause plaintiffs irreparable injury. Plaintiffs would be required to turn

6. *See, e.g.,* Ark. Stat. Ann. 34-2510, under which failure to join a party results in denial of declaratory relief.

over their books and records to persons whose authority and qualifications they claim are invalid. In cases where irreparable injury would occur if no injunction were to be granted, federal courts will entertain suit. *Denton* v. *City of Carolton,* 235 F.2d 481 (5th Cir. 1956); *Adams County* v. *Northern Pacific Ry. Co.,* 115 F.2d 768 (9th Cir. 1940). Moreover, a perusal of the statutory provisions cited in Appendix E to defendants' brief indicates that the scope of review in administrative proceedings protesting a tax assessment is narrow indeed, *i.e.,* it is limited to a determination of the correct amount of tax due.

Defendants' suggestion that plaintiffs raise their constitutional claims by way of a defense to a subpoena enforcement action is likewise without merit. Not only does this procedure involve a potential multiplicity of lawsuits, since Article VIII of the Compact provides that the Commission must apply for an enforcement order to the courts of an Article VIII Compact state, but also, it has been settled since *Ex parte Young, supra,* 209 U.S. at 163, that one does not have to wait to raise constitutional claims by defending an enforcement action:

> "To await proceedings against the company in a state court grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid." *Id.* at 165; *see also Georgia R.R. & Banking Co.* v. *Redwine, supra,* 342 U.S. at 303 n.11.

Finally, defendants assert that an examination of the statutes and rules of Colorado, where the Commission and

its Executive Director maintain their offices, discloses that this suit is maintainable in the state courts of Colorado. Assuming, *arguendo,* that all defendants assert with regard to the availability of declaratory relief, class actions and long-arm jurisdiction in the state courts of Colorado is true, it is questionable whether the Colorado courts would be willing to declare the tax laws of numerous sister states unconstitutional, and if they were, whether those sister states would be bound by Colorado's decision. Where, as here, the adequacy of the state court remedy is uncertain, there is no "plain" state remedy and the federal court can exercise jurisdiction under §1341. *Spector Motor Service, Inc.* v. *O'Connor, supra,* 340 U.S. 602; *Hillsborough* v. *Cromwell, supra,* 326 U.S. 620; *United States* v. *Livingston,* 179 F. Supp. 9 (D.S.C. 1959), *aff'd,* 364 U.S. 281 (1960). Moreover, where the choice is between a federal court passing on the constitutionality of the tax laws of 21 states or the courts of Colorado passing on the constitutionality of the tax laws of 21 states, this Court does not believe that §1341 requires a federal court to decline jurisdiction in favor of the Colorado courts. When the power of the federal court to enjoin state officials was first firmly established in *Ex parte Young, supra,* 209 U.S. 123, a storm of controversy arose as to the propriety of one judge enjoining state legislation; this controversy led to the enactment of the initial statute requiring three federal judges to hear actions challenging the constitutionality of state legislation and providing for expedited review by the Supreme Court. *See* Hart & Wechsler, *The Federal Courts and the Federal System* 967 (2d ed. 1973). If such protections of a court of special dignity and expedited review are

deemed necessary in a situation where there is, by virtue of the supremacy clause, a relationship of superior to inferior sovereignty, far greater restraint is necessary when the relationship between sister states is involved. Even if there were no questions of comity and sovereign rights, there is the important procedural feature that violation of a federal injunctive order may be punished by the issuing court regardless of where the infringement takes place. On the other hand, an injunction issued by a Colorado court would not *ipso facto* have effect in another jurisdiction. Therefore, even if plaintiffs were able to obtain injunctive relief in the Colorado state court, they would have to bring a new action in each of the other states to enforce it. Multiple litigation is thus also a necessary concomitant of filing suit in the Colorado courts. In such circumstances plaintiffs' only effective remedy lies in the federal courts.

III. *In Personam* Jurisdiction

The defendant Commission was served with process within the State of New York through service upon one Patrick Greene, a Commission tax auditor, at the Commission's New York City office. Additionally, all defendants were served outside the State of New York: the Commission in Colorado through defendant Corrigan, and the individual Commissioners in their home states.

Defendants argue that the service upon the Commission within the State of New York by serving Greene with a copy of the summons and complaint at the Commission's New York office was ineffective to grant in personam jurisdiction over the Commission. They argue further that the out-of-state service did not give this court in personam

jurisdiction on the grounds that the New York "long-arm" statute, N.Y. C.P.L.R. §302 (McKinney 1972), has no application to this lawsuit (1) because §302 does not apply to sister states, their agencies or public officers; and (2) because it is contrary to the policy of the New York courts to entertain suits involving the tax laws of sister states.

A. *Service upon the Commission within New York State*

The applicable provision of the Federal Rules of Civil Procedure (hereinafter the "Rules") is Rule 4(d)(6), which spells out when to serve when serving a state, municipal corporation or "other governmental organization". Before delving into the particulars of Rule 4(d)(6), it is well to point out that there is no inconsistency, as plaintiffs seem to suggest, in holding that, because the constitutional validity of the Commission is a major issue in this lawsuit, the Commission is not immune from suit under the exception to eleventh amendment immunity carved out by *Ex parte Young, supra,* 209 U.S. 123, and in viewing the Commission as a government agency in order to determine which statutes apply for the purposes of service of process. The varying federal and state rules for service of process on different types of entities, *e.g.*, corporations, governmental agencies or commissions, are keyed to the differing internal structures of those entities. They are set forth in order to assure proper notice of a lawsuit. The overall validity of the entity itself is a separate issue.

Rule 4(d)(6) provides that personal service shall be effected:

> "Upon a state or municipal corporation or other governmental organization thereof subject to suit, by

> delivering a copy of the summons and of the complaint to the *chief executive officer* thereof *or* by serving the summons and complaint in the manner prescribed *by the law of that state* for the service of summons or other like process upon any such defendant." (Emphasis added.)

Clearly, Greene is not the Commission's "chief executive officer"; that person is the Commission's Executive Director, defendant Corrigan. Therefore, we must look to the second half of Rule 4(d)(6) to determine whether service on Greene satisfied the law of "that state".

Defendants contend that the words "that state" refer to the state of which the Commission is an agency; since it is an agency of 21 states, they argue, plaintiffs must comply with the laws for service of process of all 21 member states. It is inconceivable to this Court that Rule 4(d)(6) would require plaintiffs to go through such an exercise as to comply with the laws of 21 states. It seems far more reasonable, given the unique nature of the defendant Commission, to interpret "that state" to mean the state where the Commission is physically located and of which it is a citizen: namely, Colorado.

Turning, then, to the applicable Colorado statute, Rule 4 of Colorado's Rules of Civil Procedure provides, in pertinent part:

> "(e) Personal Service in State. Personal service within the state shall be as follows:
>
> • • •
>
> (9) Upon a department or agency of the state, subject to suit, by delivering a copy thereof to the principal officer, chief clerk, or other executive employee thereof." Colo. Rev. Stat. Rule 4 (1970 Rev.).

Plaintiffs contend that Greene qualifies under Colorado law as the "principal officer, chief clerk, or other executive employee" of the Commission's New York office. The Commission asserts that Greene is in no wise in charge of the Commission's New York activities and has no executive responsibilities. Given this dispute, this Court cannot say, without further inquiry into the facts, whether service upon Greene in New York was sufficient for this Court to acquire in personam jurisdiction over the Commission. Because, however, this Court holds that service upon defendants outside the State of New York was effective, a resolution of this factual issue is unnecessary.

B. Service upon defendants outside the State of New York

Whether the process of this court may extend beyond the territorial limits of the State of New York is a function of the interrelationship of Rule 4 of the Federal Rules of Civil Procedure and N.Y. C.P.L.R. §§302, 312 and 313 (McKinney 1972). Rule 4(f) provides in pertinent part:

> "All process other than a subponea may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state."

Since no federal statute authorizes extra-territorial service in the case at bar, the validity of service outside the state upon each of the defendants depends upon "these rules". The relevant provision is Rule 4(e) which provides, in pertinent part:

> "Whenever a statute or rule of court of the state in which the district court is held provides (1) for the

> service of a summons . . . upon a party not an inhabitant of or found within the state, . . . service may . . . be made under the circumstances and in the manner prescribed in the statute or rule."

The "statute . . . of court of the state in which the district court is held" which provides "for the service of a summons . . . upon a party not an inhabitant of or found within the state" is N.Y. C.P.L.R. §313, which provides, in relevant part:

> "A person . . . subject to the jurisdiction of the courts of the state under Section 301 or 302 . . . may be served with the summons without the state, in the same manner as service is made within the state. . . ."

New York's long-arm statute, N.Y. C.P.L.R. §302, sets forth the circumstances in which a New York court can exercise personal jurisdiction over a nondomiciliary:

> "(a) *Acts which are the basis of jurisdiction.* As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary . . . who in person or through an agent:
>
> 1. transacts any business within the state. . . ."

Defendants contend that this provision of New York's long-arm statute was intended to deal with causes of action growing out of the conduct of "businesses" and that it has no application to actions against other states or their officials in the administration of their tax laws. They base their argument (1) upon an incorrect interpretation of N.Y. C.P.L.R. §§311 and 312 (McKinney 1972) and (2) upon a body of case law which holds that one state will not enforce the revenue measures of another.

More particularly, defendants argue that §§311 and 312, which prescribe the mode of service on, *inter alia*, governmental organizations, do not specifically state that the mode of service set forth therein is to be applied to governmental organizations where jurisdiction is obtained through §302, as does §313. This argument places the proverbial cart before the horse. Section 313 is not a parallel of §§311 and 312. Whereas §§311 and 312 provide the *mode of service* for entities such as three-judge courts, corporations, and governmental subdivisions, §313 indicates *when* service of process outside the State of New York will give the courts personal jurisdiction over a defendant. Therefore, §§311 and 312 are analogous to N.Y. C.P.L.R. §§307, 308, 309 and 310 (McKinney 1972), which set forth the proper mode of service upon the state, a natural person, an infant or incompetent, and a partnership, respectively. The parallel of §313 is N.Y. C.P.L.R. §314 (McKinney 1972), which sets forth when service of process outside the state will *not* give the courts personal jurisdiction over a defendant. Defendants' argument, carried to its logical conclusion, would mean that the long-arm statute would not apply to corporations either (for the mode of service upon corporations is also described in §311), which of course it does. *Potter's Photographic Applications Co.* v. *Ealing Corp.*, 292 F. Supp. 92 (E.D.N.Y. 1968).

The two cases cited by defendants in support of their argument that §302 does not apply to the governments of sister states—*Sutton* v. *City of Philadelphia*, 286 F. Supp. 143 (S.D.N.Y. 1968) and *Lawrence* v. *Blackwell*, 298 F. Supp. 708 (N.D. Ga. 1969)—are easily distinguishable from the case at bar. Those cases involved the setting aside of service of process upon defendants who were

neither personally within the state nor had agents within the state. In *Sutton* there was no showing of any activities whatsoever by defendants within the forum district; in *Lawrence* there were only isolated cases of mailings to the district by defendants. Both *Sutton* and *Lawrence* are distinguishable from the instant case because defendants maintain an office and conduct audits in the forum state. On the facts presented here, these cases are not in point and cannot be interpreted to establish the broad rule of governmental immunity defendants suggest.

Defendants also argue that the long-arm statute is inapplicable to the instant case by relying upon cases which hold that one state will not enforce the revenue laws of another. The instant case, however, is not one to "enforce revenue measures" or "collect taxes". Plaintiffs are resisting what they claim are unconstitutional actions by the tax collector. Even if it were against New York State policy to entertain this type of suit (a proposition for which defendants cite no relevant authority, certainly not *City of Philadelphia* v. *Cohen*, 11 N.Y.2d 401, 230 N.Y.S.2d 183, 184 N.E.2d 167 (1962)), a federal court would not be forbidden from utilizing the state long-arm statute to obtain personal jurisdiction in a case where federal subject matter jurisdiction clearly obtains. Although defendants do launch an attack on subject matter jurisdiction, as discussed *supra*, they do not question the diversity or federal question basis of this court's jurisdiction.

Accordingly, applying the aforementioned statutes to the facts of the instant case, our inquiry must be whether the defendants have sufficient contacts within the State of New York to serve as a basis for jurisdiction in that state under §302 (§302 rather than §301 since the cause of action

arose out of the New York activity, *i.e.*, the audits) so as to enable this court to exercise personal jurisdiction over the defendants through service of process outside the state of New York, as allowed by §313 and Rule 4(e).

1. Jurisdiction Over the Commission

It is undisputed that the Commission (1) maintains an office in New York; (2) conducts audits on multistate corporations located in the area from that office; (3) employs three auditors in New York who work out of the New York office; and (4) is listed in the Manhattan Telephone Directory.

The fact that the activity engaged in by defendants within New York, *i.e.*, conducting audits, is not a typical commercial enterprise, does not remove it from the ambit of the "transacts any business" test of §302. The term "transacts any business" has been held to include: the execution of a separation agreement, *Kochenthal* v. *Kochenthal*, 26 App. Div. 2d 117, 282 N.Y.S.2d 36 (1967); the making of a retainer for legal services, *Elman* v. *Belson*, 32 App. Div. 2d 422, 302 N.Y.S.2d 961 (1969); the entry into New York by nondomiciliary defendants to attend one meeting concerning shares held in street name by a New York broker, *Parker* v. *Rogerson*, 33 App. Div. 2d 284, 307 N.Y.S.2d 986, *appeal dismissed*, 26 N.Y.2d 964, 311 N.Y.S.2d 7, 259 N.E.2d 479 (1970); and the entry into New York by a nondomiciliary to receive medical treatment, *Cohen* v. *Haberkorn*, 30 App. Div. 2d 530, 291 N.Y.S. 2d 119 (1968). The test is whether the defendant has engaged in "some purposeful activity in this State in connection with the matter in suit." *Longines-Wittnauer*

Appendix B

Watch Co. v. *Barnes & Reinecke*, 15 N.Y.2d 443, 457, 261 N.Y.S.2d 8, 18, 209 N.E.2d 68, 76 (1965). Clearly, the Commission's conducting of audits is "purposeful activity" in the State of New York within the meaning of the "transacts any business" test of §302.

Once a basis for jurisdiction has been established under §302, §313 directs that service of process may be made "without the state, in the same manner as service is made within the state." The applicable New York statute is N.Y. C.P.L.R. §312, which provides, in pertinent part:

> ". . . Personal service upon a board or commission having a chairman or other presiding officer, secretary or clerk, by whatever official title he is called, may be made by delivering the summons to him. . . ."

In the instant case the service of a copy of the summons and complaint upon defendant Corrigan, as the Commission's Executive Director in Colorado, was sufficient to confer personal jurisdiction over the Commission in this court.

2. Jurisdiction Over the Individual Defendants

The individual defendants are charged with violations of the Civil Rights Act, and in this regard, relief is sought against them individually. *See United States ex rel. Wood* v. *Blacker*, 335 F. Supp. 43 (D.N.J. 1971). Service of process outside the State of New York is permissible to confer in personam jurisdiction over them in this court if a basis for the exercise of jurisdiction exists under §302. In determining whether these defendants have engaged in "purposeful activity" in this state in connection with the matter in suit, service performed by their agents may be attributed to the defendants for jurisdictional purposes.

Appendix B

Collateral Factors Corp. v. *Meyers*, 39 App. Div. 2d 27, 29-30, 330 N.Y.S.2d 833, 835 (1972). Therefore, the acts of Greene and the other auditors in New York must be attributed to the individual Commissioners and such acts therefore serve as the basis of jurisdiction over them as well as over the Commission itself. Accordingly, service upon the individual defendants in their home states was proper.

IV. Failure to State a Claim

Defendants move pursuant to Rule 12(b)(6) to dismiss for failure to state a claim upon which relief can be granted. This motion is frivolous. The well-settled rule is that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *K.S. Corp.* v. *Chemstrand Corp.*, 198 F. Supp. 310 (S.D.N.Y. 1961). Both sides have submitted lengthy and erudite briefs discussing the merits of the claims raised in the complaint. The fact that the parties found it necessary to so extensively brief the sufficiency of the claims tells this Court that a decision must await a determination on the merits.

Accordingly, defendants' motions to dismiss the action on the grounds that this court lacks jurisdiction over the subject matter and persons of the defendants, and for failure to state a claim upon which relief can be granted are denied in all respects.

So ordered.

Dated: New York, New York
September 17, 1973

/s/ Charles H. Tenney

U.S.D.J.

APPENDIX C

THE JUDGMENT OF THE DISTRICT COURT ENTERED JULY 14, 1976

Appendix C

Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 3438 (CLB)

UNITED STATES STEEL CORPORATION, STANDARD BRANDS INCORPORATED, GENERAL MILLS, INC., and THE PROCTER & GAMBLE DISTRIBUTING COMPANY, on behalf of themselves and all persons similarly situated,

Plaintiffs,

and

BRISTOL-MYERS CO., ELTRA CORPORATION, GOODYEAR TIRE AND RUBBER COMPANY, GREEN GIANT COMPANY, INTERNATIONAL HARVESTER COMPANY, INTERNATIONAL PAPER COMPANY, INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, McGRAW-HILL, INC., N.L. INDUSTRIES, INC. and UNION CARBIDE CORPORATION,

Intervenor-Plaintiffs,

against

MULTISTATE TAX COMMISSION, EUGENE F. CORRIGAN, Executive Director, Multistate Tax Commission, and ERIC E. WOHLFORTH (Alaska), RICHARD HEATH (Arkansas), JOHN H. HECKERS (Colorado), J. ED. STRAUGHN (Florida), RALPH W. KONDO (Hawaii), EWING H. LITTLE (Idaho), JAS. O. MATHIS (Indiana), JAMES T. McDONALD (Kansas), ALLISON GREEN (Michigan), JAMES SCHAFFNER (Missouri), J. MORLEY COOPER (Montana), WM. E. PETERS (Nebraska), JOHN J. SHEEHAN (Nevada), FRED L. O'CHESKEY (New Mexico), BRYON L. DORGAN (North Dakota), CHARLES H. MACK (Oregon), ROBERT F. CALVERT (Texas), VERNON L. HOLMAN (Utah), GEORGE KINNEAR (Washington) and E. S. MacCLEAN (Wyoming), all Commissioners of the Multistate Tax Commission from their respective states,

Defendants.

Appendix C

Defendants having moved the Court for summary judgment, pursuant to Rule 56, of the Federal Rules of Civil Procedure, and the said motion having come on to be heard before a Statutory Court consisting of the Honorables Meskill, C.J., Weinfeld, D.J., and Brieant, D.J., and the Court thereafter on July 8, 1976, having handed down its memorandum opinion granting the said motion, and directing the Clerk to enter judgment, it is,

ORDERED, ADJUDGED and DECREED: That defendants Multistate Tax Commission, Eugene F. Corrigan, Executive Director, Multistate Tax Commission, and Eric E. Wohlforth (Alaska), Richard Heath (Arkansas), John H. Heckers (Colorado), J. Ed. Straughn (Florida), Ralph W. Kondo (Hawaii), Ewing H. Little (Idaho), Jas. O. Mathis (Indiana), James T. McDonald (Kansas), Allison Green (Michigan), James Schaffner (Missouri), J. Morley Cooper (Montana), Wm. E. Peters (Nebraska), John J. Sheehan (Nevada), Fred L. O'Cheskey (New Mexico), Bryon L. Dorgan (North Dakota), Charles H. Mack (Oregon), Robert F. Calvert (Texas), Vernon L. Holman (Utah), George Kinnear (Washington) and E. S. MacClean (Wyoming), all Commissioners of the Multistate Tax Commission from their respective states have judgment against plaintiffs United States Steel Corporation, Standard Brands Incorporated, General Mills, Inc., and The Procter & Gamble Distributing Company, on behalf of themselves and all persons similarly situated and intervenor-plaintiffs Bristol-Myers Co., Electra Corporation, Goodyear Tire & Rubber Company, Green Giant Co., International Harvester Com-

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pany, International Paper Co., International Telephone & Telegraph Corporation, McGraw-Hill, Inc., N.L. Industries, Inc., and Union Carbide Corporation dismissing the action.

Dated: New York, N.Y.
July 14, 1976

/s/ RAYMOND F. BURGHARDT
Clerk

APPENDIX D

THE NOTICE OF APPEAL

Appendix D

Notice of Apeal to the Supreme Court of the United States

Assigned to Judge Brieant

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 3438 (CLB)

UNITED STATES STEEL CORPORATION, *et. al.*, on behalf of themselves and all persons similarly situated,

Plaintiffs,

against

MULTISTATE TAX COMMISSION, *et al.*,

Defendants.

SIRS:

PLEASE TAKE NOTICE, that plaintiffs United States Steel Corporation, Standard Brands Incorporated, General Mills, Inc., and The Procter & Gamble Distributing Company, and intervenor-plaintiffs Bristol-Myers Co., Goodyear Tire & Rubber Company, Green Giant Company, International Harvester Company, International Paper Company, International Telephone & Telegraph Corporation, McGraw-Hill, Inc., NL Industries, Inc., Eltra Corporation, and Union Carbide Corporation, hereby appeal to the Supreme Court of the United States from the judgment entered in this ac-

Appendix D

tion on July 14, 1976 granting summary judgment to defendants and dismissing the plaintiffs' complaint.

This appeal is taken pursuant to 28 U.S.C. §1253,

Dated: New York, New York
September 7, 1976

Yours, etc.,

WHITE & CASE

By Thomas McGarrey

A Member of the Firm
Attorneys for Plaintiffs
and Intervenor Plaintiffs
other than Eltra Corporation
14 Wall Street
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To:

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Appendix D

Certificate of Service

September 7, 1976

I hereby certify that on this 7th day of September, 1976, copies of this Notice of Appeal were mailed, postage prepaid, to William D. Dexter, Esq. and Eaton VanWinkle & Greenspoon, Esqs., attorneys for defendants, 600 Third Avenue, New York, New York 10016. I further certify that all parties required to be served have been served.

/s/ TODD B. SOLLIS

TODD B. SOLLIS

APPENDIX E

THE MULTISTATE TAX COMPACT AS PROPOSED FOR ENACTMENT

Appendix E

Multistate Taxation

Multistate Tax Compact—The Law

Below is reproduced the model act proposed for enactment as the multistate tax compact for the various states. With minor nonsubstantive exceptions, this is the act each member state has enacted.

Article I. Purposes

The purposes of this compact are to: (1) Facilitate proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes; (2) Promote uniformity or compatibility in significant components of tax systems; (3) Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration; (4) Avoid duplicative taxation.

Article II. Definitions

As used in this compact:

1. "**State**" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any Territory or Possession of the United States.

2. "**Subdivision**" means any governmental unit or special district of a State.

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3. "Taxpayer" means any corporation, partnership, firm, association, governmental unit or agency or person acting as a business entity in more than one State.

4. "Income Tax" means a tax imposed on or measured by net income including any tax imposed on or measured by an amount arrived at by deducting expenses from gross income, one or more forms of which expenses are not specifically and directly related to particular transactions.

5. "Capital stock tax" means a tax measured in any way by the capital of a corporation considered in its entirety.

6. "Gross receipts tax" means a tax, other than a sales tax, which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which no deduction is allowed which would constitute the tax and income tax.

7. "Sales tax" means a tax imposed with respect to the transfer for a consideration of ownership, possession or custody of tangible personal property or the rendering of services measured by the price of the tangible personal property transferred or services rendered and which is required by State or local law to be separately stated from the sales price by the seller, or which is customarily separately stated from the sales price, but does not include a tax imposed exclusively on the sale of a specifically identified commodity or article or class of commodities or articles.

8. "Use tax" means a nonrecurring tax, other than a sales tax, which (a) is imposed on or with respect to the exercise or enjoyment of any right or power over tangible personal property incident to the ownership, possession or custody of that property or the leasing of that property from another including any consumption, keeping, retention, or other use of tangible personal property and (b) is complementary to a sales tax.

9. "Tax" means an income tax, capital stock tax, gross receipts tax, sales tax, use tax, and any other tax which has a multistate impact, except that the provisions of Articles III, IV and V of this compact shall apply only to the taxes specifically designated therein and the provisions of Article IX of this compact shall apply only in respect to determinations pursuant to Article IV.

Article III. Elements of Income Tax Laws

Taxpayer option, state and local taxes.—1. Any taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party State or pursuant to the laws of subdivisions in two or more party States may elect to apportion and allocate his income in the manner provided by the laws of such State or by the laws of such States and subdivisions without reference to this compact, or may elect to apportion and allocate in accordance with Article IV. This election for any tax year may be made in all party States or subdivisions thereof or in any one or more of the party States or subdivisions thereof without reference to the election

made in the others. For the purposes of this paragraph, taxes imposed by subdivisions shall be considered separately from State taxes and the apportionment and allocation also may be applied to the entire tax base. In no instance wherein Article IV is employed for all subdivisions of a State may the sum of all apportionments and allocations to subdivisions within a State be greater than the apportionment and allocation that would be assignable to that State if the apportionment or allocation were being made with respect to a State income tax.

Taxpayer option, short form.—2. Each party State or any subdivision thereof which imposes an income tax shall provide by law that any taxpayer required to file a return, whose only activities within the taxing jurisdiction consist of sales and do not include owning or renting real estate or tangible personal property, and whose dollar volume of gross sales made during the tax year within the State or subdivision, as the case may be, is not in excess of $100,000 may elect to report and pay any tax due on the basis of a percentage of such volume and shall adopt rates which shall produce a tax which reasonably approximates the tax otherwise due. The Multistate Tax Commision, not more than once in five years, may adjust the $100,000 figure in order to reflect such changes as may occur in the real value of the dollar, and such adjusted figure, upon adoption by the Commission, shall replace the $100,000 figure specifically provided herein. Each party State and subdivision thereof may make the same election available to taxpayers additional to those specified in this paragraph.

Coverage.—3. Nothing in this Article relates to the reporting or payment of any tax other than an income tax.

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Article IV. Division of Income

Definitions.—1. As used in this Article, unless the context otherwise requires:

(a) "Business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

(b) "Commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed.

(c) "Compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

(d) "Financial organization" means any bank, trust company, savings bank, industrial bank, land bank, safe deposit company, private banker, savings and loan association, credit union, cooperative bank, small loan company, sales finance company, investment company, or any type of insurance company.

(e) "Nonbusiness income" means all income other than business income.

(f) "Public utility" means any business entity (1) which owns or operates any plant, equipment, property, franchise, or license for the transmission of communications, transportation of goods or persons, except by pipe line, or the production, transmission, sale, delivery, or furnishing

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of electricity, water or steam; and (2) whose rates of charges for goods or services have been established or approved by a Federal, State or local government or governmental agency.

(g) "Sales" means all gross receipts of the taxpayer not allocated under paragraphs of this Article.

(h) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any Territory or Possession of the United States, and any foreign country or political subdivision thereof.

(i) "This State" means the State in which the relevant tax return is filed or, in the case of application of this Article to the apportionment and allocation of income for local tax purposes, the subdivision or local taxing district in which the relevant tax return is filed.

2. Any taxpayer having income from business activity which is taxable both within and without this State, other than activity as a financial organization or public utility or the rendering of purely personal services by an individual, shall allocate and apportion his net income as provided in this Article. If a taxpayer has income from business activity as a public utility but derives the greater percentage of his income from activities subject to this Article, the taxpayer may elect to allocate and apportion his entire net income as provided in this Article.

3. For purposes of allocation and apportionment of income under this Article, a taxpayer is taxable in another State if (1) in that State he is subject to a net income tax,

a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax, or (2) that State has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the State does or does not.

4. Rents and royalties from real or tangible personal property, capital gains, interest, dividends or patent or copyright royalties, to the extent that they constitute non-business income, shall be allocated as provided in paragraphs 5 through 8 of this Article.

5. (a) Net rents and royalties from real property located in this State are allocable to this State.

(b) Net rents and royalties from tagible personal property are allocable to this State: (1) if and to the extent that the property is utilized in this State, or (2) in their entirety if the taxpayer's commercial domicile is in this State and the taxpayer is not organized under the laws of or taxable in the State in which the property is utilized.

(c) The extent of utilization of tangible personal property in a State is determined by multiplying the rents and royalties by a fraction, the numerator of which is the number of days of physical location of the property in the State during the rental or royalty period in the taxable year and the denominator of which is the number of days of physical location of the property everywhere during all rental of royalty periods in the taxable year. If the physical location of the property during the rental or royalty period is unknown or unascertainable by the taxpayer, tangible personal property is utilized in the State in which the property

was located at the time the rental or royalty payer obtained possession.

6. (a) Capital gains and losses from sales of real property located in this State are allocable to this state.

(b) Capital gains and losses from sales of tangible personal property are allocable to this State if (1) the property had a situs in this State at the time of the sale, or (2) the taxpayer's commercial domicile is in this State and the taxpayer is not taxable in the State in which the property had a situs.

(c) Capital gains and losses from sales of intangible personal property are allocable to this state if the taxpayer's commercial domicile is in this state.

7. Interest and dividends are allocable to this State if the taxpayer's commercial domicile is in this state.

8. (a) Patent and copyright royalties are allocable to this State: (1) if and to the extent that the patent or copyright is utilized by the payer in this State, or (2) if and to the extent that the patent copyright is utilized by the payer in a State in which the taxpayer is not taxable and the taxpayer's commercial domicile is in this State.

(b) A patent is utilized in a State to the extent that it is employed in production, fabrication, manufacturing, or other processing in the State or to the extent that a patented product is produced in the State. If the basis of receipts from patent royalties does not permit allocation to State or if the accounting procedures do not reflect States of

utilization, the patent is utilized in the State in which the taxpayer's commercial domicile is located.

(c) A copyright is utilized in a State to the extent that printing or other publication originates in the State. If the basis of receipts from copyright royalties does not permit allocation to States or if the accounting procedures do not reflect States of utilization, the copyright is utilized in the State in which the taxpayer's commercial domicile is located.

9. All business income shall be apportioned to this State by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three.

10. The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this State during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period.

11. Property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at eight times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals.

12. The average value of property shall be determined by averaging the values at the beginning and ending of the

tax period but the tax administrator may require the averaging of monthly values during the tax period if reasonably required to reflect properly the average value of the taxpayer's property.

13. The payroll factor is a fraction, the numerator of which is the total amount paid in this State during the tax period by the taxpayer for compensation and the denominator of which is the total compensation paid everywhere during the tax period.

14. Compensation is paid in this state if:

(a) the individual's service is performed entirely within the State;

(b) the individual's service is performed both within and without the State, but the service performed without the State is incidental to the individual's service within the State; or

(c) some of the service is performed in the State and (1) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in the State, or (2) the base of operations or the place from which the service is directed or controlled is not in any State in which some part of the service is performed, but the individual's residence is in this State.

15. The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this State during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period.

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16. Sales of tangible personal property are in this State if:

(a) the property is delivered or shipped to a purchaser, other than the United States Government, within this State regardless of the f.o.b. point or other conditions of the sale; or

(b) the property is shipped from an office, store, warehouse, factory, or other place of storage in this State and (1) the purchaser is the United States Government or (2) the taxpayer is not taxable in the State of the purchaser.

17. Sales, other than sales of tangible personal property, are in this State if:

(a) the income-producing activity is performed in this State; or

(b) the income-producing activity is performed both in and outside this State and a greater proportion of the income-producing activity is performed in this State than in any other State, based on costs of performance.

18. If the allocation and apportionment provisions of this Article do not fairly represent the extent of the taxpayer's business activity in this State, the taxpayer may petition for or the tax administrator may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(a) separate accounting;

(b) the exclusion of any one or more of the factors;

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(c) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this State; or

(d) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

Article V. Elements of Sales and Use Tax Laws

Tax credit.—1. Each purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use taxes paid by him with respect to the same property to another State and any subdivision thereof. The credit shall be applied first against the amount of any use tax due the State, and any unused portion of the credit shall then be applied against the amount of any use tax due a subdivision.

Exemption certificates, vendors may rely.—2. Whenever a vendor receives and accepts in good faith from a purchaser a resale or other exemption certificate or other written evidence of exemption authorized by the appropriate State or subdivision taxing authority, the vendor shall be relieved of liability for a sales or use tax with respect to the transaction.

Article VI. The Commission

Organization and management.—1. (a) The Multistate Tax Commission is hereby established. It shall be composed of one "member" from each party State who shall be the head of the State agency charged with the admin-

istration of the types of taxes to which this compact applies. If there is more than one such agency the State shall provide by law for the selection of the Commission member from the heads of the relevant agencies. State law may provide that a member of the Commission be represented by an alternate but only if there is on file with the Commission written notification of the designation and identity of the alternate. The Attorney General of each party State or his designee, or other counsel if the laws of the party State specifically provide, shall be entitled to attend the meetings of the Commission, but shall not vote. Such Attorneys General, designees, or other counsel shall receive all notices of meetings required under paragraph 1(e) of this Article.

(b) Each party State shall provide by law for the selection of representatives from its subdivisions affected by this compact to consult with the Commission member from that State.

(c) Each member shall be entitled to one vote. The Commission shall not act unless a majority of the members are present, and no action shall be binding unless approved by a majority of the total number of members.

(d) The Commission shall adopt an official seal to be used as it may provide.

(e) The Commission shall hold an annual meeting and such other regular meetings as its bylaws may provide and such special meetings as its Executive Committee may determine. The Commission bylaws shall specify the dates of the annual and any other regular meetings, and shall

provide for the giving of notice of annual, regular and special meetings. Notice of special meetings shall include the reasons therefor and an agenda of the items to be considered.

(f) The Commission shall elect annually, from among its members, a Chairman, a Vice Chairman and a Treasurer. The Commission shall appoint an Executive Director who shall serve at its pleasure, and it shall fix his duties and compensation. The Executive Director shall be Secretary of the Commission. The Commission shall make provision for the bonding of such of its officers and employees as it may deem appropriate.

(g) Irrespective of the civil service, personnel or other merit system laws of any party State, the Executive Director shall appoint or discharge such personnel as may be necessary for the performance of the functions of the Commission and shall fix their duties and compensation. The Commission bylaws shall provide for personnel policies and programs.

(h) The Commission may borrow, accept or contract for the services of personnel from any State, the United States, or any other governmental entity.

(i) The Commission may accept for any of its purposes and functions any and all donations and grants of money, equipment, supplies, materials and services, conditional or otherwise, from any governmental entity, and may utilize and dispose of the same.

(j) The Commission may establish one or more offices for the transacting of its business.

(k) The Commission shall adopt bylaws for the conduct of its buisness. The Commission shall publish its bylaws in convenient form, and shall file a copy of the bylaws and any amendments thereto with the appropriate agency or officer in each of the party States.

(l) The Commission annually shall make to the Governor and legislature of each party State a report covering its activities for the preceding year. Any donation or grant accepted by the Commission or services borrowed shall be reported in the annual report of the Commission, and shall include the nature, amount and conditions, if any, of the donation, gift, grant or services borrowed and the identity of the donor or lender. The Commission may make additional reports as it may deem desirable.

Committees.—2. (a) To assist in the conduct of its business when the full Commisison is not meeting, the Commission shall have an Executive Committee of seven members, including the Chairman, Vice Chairman, Treasurer and four other members elected annually by the Commission. The Executive Committee, subject to the provisions of this compact and consistent with the policies of the Commission, shall function as provided in the bylaws of the Commission.

(b) The Commission may establish advisory and technical committees, membership on which may include private persons and public officials, in furthering any of its activities. Such committees may consider any matter of concern to the Commission, including problems of special interest to any party State and problems dealing with particular types of taxes.

(c) The Commission may establish such additional committees as its bylaws may provide.

Powers. 3. In addition to powers conferred elsewhere in this compact, the Commission shall have power to: (a) Study State and local tax systems and particular types of State and local taxes; (b) Develop and recommend proposals for an increase in uniformity or compatibility of State and local tax laws with a view toward encouraging the simplification and improvement of State and local tax law and administration; (c) Compile and publish information as in its judgment would assist the party States in implementation of the compact and taxpayers in complying with State and local tax laws; (d) Do all things necessary and incidental to the administration of its functions pursuant to this compact.

4. (a) The Commission shall submit to the Governor or designated officer or officers of each party State a budget of its estimated expenditures for such period as may be required by the laws of that State for presentation to the legislature thereof.

(b) Each of the Commission's budgets of estimated expenditures shall contain specific recommendations of the amounts to be appropriated by each of the party States. The total amount of appropriations requested under any such budget shall be apportioned among the party States as follows: one-tenth in equal shares; and the remainder in proportion to the amount of revenue collected by each party State and its subdivisions from income taxes, capital stock taxes, gross receipts taxes, sales and use taxes. In

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determining such amounts, the Commission shall employ such available public sources of information as in its judgment, present the most equitable and accurate comparisons among the party States. Each of the Commission's budgets of estimated expenditures and requests for appropriations shall indicate the sources used in obtaining information employed in applying the formula contained in this paragraph.

(c) The Commission shall not pledge the credit of any party State. The Commission may meet any of its obligations in whole or in part with funds available to it under paragraph (1) (i) of this Article: provided that the Commission takes specific action setting aside such funds prior to incurring any obligation to be met in whole or in part in such manner. Except where the Commission makes use of funds available to it under paragraph 1 (i), the Commission shall not incur any obligation prior to the allotment of funds by the party States adequate to meet the same.

(d) The Commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the Commission shall be subject to the audit and accounting procedures established under its bylaws. All receipts and disbursements of funds handled by the Commission shall be audited yearly by a certified or licensed public accountant and the report of the audit shall be included in and become part of the annual report of the Commission.

(e) The accounts of the Commission shall be open at any reasonable time for inspection by duly constituted officers of the party States and by any persons authorized by the Commission.

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(f) Nothing contained in this Article shall be construed to prevent Commission compliance with laws relating to audit or inspection of accounts by or on behalf of any government contributing to the support of the Commission.

Article VII. Uniform Regulations and Forms

1. Whenever any two or more party States, or subdivisions of party States, have uniform or similar provisions of law relating to an income tax, capital stock tax, gross receipts tax, sales or use tax, the Commission may adopt uniform regulations for any phase of the administration of such law, including assertion of jurisdiction to tax, or prescribing uniform tax forms. The Commission may also act with respect to the provisions of Article IV of this compact.

2. Prior to the adoption of any regulation, the Commission shall:

(a) As provided in its bylaws, hold at least one public hearing on due notice to all affected party States and subdivisions thereof and to all taxpayers and other persons who have made timely request of the Commission for advance notice of its regulation-making proceedings.

(b) Afford all affected party States and subdivisions and interested persons an opportunity to submit relevant written data and views, which shall be considered fully by the Commission.

3. The Commission shall submit any regulations adopted by it to the appropriate officials of all party States and

subdivisions to which they might apply. Each such State and subdivision shall consider any such regulation for adoption in accordance with its own laws and procedures.

Article VIII. Interstate Audits

1. This article shall be in force only in those party States that specifically provide therefor by statute.

2. Any party State or subdivision thereof desiring to make or participate in an audit of any accounts, books, papers, records or other documents may request the Commission to perform the audit on its behalf. In responding to the request, the Commission shall have access to and may examine, at any reasonable time, such accounts, books, papers, records, and other documents and any relevant property or stock of merchandise. The Commission may enter into agreements with party States or their subdivisions for assistance in performance of the audit. The Commission shall make charges, to be paid by the State or local government or governments for which it performs the service, for any audits performed by it in order to reimburse itself for the actual costs incurred in making the audit.

3. The Commission may require the attendance of any person within the State where it is conducting an audit or part thereof at a time and place fixed by it within such State for the purpose of giving testimony with respect to any account, book, paper, document, other record, property or stock of merchandise being examined in connection with the audit. If the person is not within the jurisdiction, he may

be required to attend for such purpose at any time and place fixed by the Commission within the State of which he is a resident; provided that such State has adopted this Article.

4. The Commission may apply to any court having power to issue compulsory process for orders in aid of its powers and responsibilities pursuant to this Article and any and all such courts shall have jurisdiction to issue such orders. Failure of any person to obey any such order shall be punishable as contempt of the issuing court. If the party or subject matter on account of which the Commission seeks an order is within the jurisdiction of the court to which application is made, such application may be to a court in the State or subdivision on behalf of which the audit is being made or a court in the State in which the object of the order being sought is situated. The provisions of this paragraph apply only to courts in a State that has adopted this Article.

5. The Commission may decline to perform any audit requested if it finds that its available personnel or other resources are insufficient for the purpose or that, in the terms requested, the audit is impracticable of satisfactory performance. If the Commission, on the basis of its experience, has reason to believe that an audit of a particular taxpayer, either at a particular time or on a particular schedule, would be of interest to a number of party States or their subdivisions, it may offer to make the audit or audits, the offer to be contingent on sufficient participation therein as determined by the Commission.

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6. Information obtained by any audit pursuant to this Article shall be confidential and available only for tax purposes to party States, their subdivisions or the United States. Availability of information shall be in accordance with the laws of the States or subdivisions on whose account the Commission performs the audit, and only through the appropriate agencies or officers of such States or subdivisions. Nothing in this Article shall be construed to require any taxpayer to keep records for any period not otherwise required by law.

7. Other arrangements made or authorized pursuant to law for cooperative audit by or on behalf of the party States or any of their subdivisions are not superseded or invalidated by this Article.

8. In no event shall the Commission make any charge against a taxpayer for an audit.

9. As used in this Article, "tax," in addition to the meaning ascribed to it in Article II, means any tax or license fee imposed in whole or in part for revenue purposes.

Article IX. Arbitration

1. Whenever the Commission finds a need for settling disputes concerning apportionments and allocations by arbitration, it may adopt a regulation placing this Article in effect, notwithstanding the provisions of Article VII.

2. The Commission shall select and maintain an Arbitration Panel composed of officers and employees of State

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and local governments and private persons who shall be knowledgeable and experienced in matters of tax law and administration.

3. Whenever a taxpayer who has elected to employ Article IV, or whenever the laws of the party State or subdivision thereof are substantially identical with the relevant provisions of Article IV, the taxpayer, by written notice to the Commission and to each party State or subdivision thereof that would be affected, may secure arbitration of an apportionment or allocation, if he is dissatisfied with the final administrative determination of the tax agency of the State or subdivision with respect thereto on the ground that it would subject him to double or multiple taxation by two or more party States or subdivisions thereof. Each party State and subdivision thereof hereby consents to the arbitration as provided herein, and agrees to be bound thereby.

4. The Arbitration Board shall be composed of one person selected by the taxpayer, one by the agency or agencies involved, and one member of the Commission's Arbitration Panel. If the agencies involved are unable to agree on the person to be selected by them, such person shall be selected by lot from the total membership of the Arbitration Panel. The two persons selected for the Board in the manner provided by the foregoing provisions of this paragraph shall jointly select the third member of the Board. If they are unable to agree on the selection, the third member shall be selected by lot from among the total membership of the Arbitration Panel. No member of a Board selected by lot

shall be qualified to serve if he is an officer or employee or is otherwise affiliated with any party to the arbitration proceeding. Residence within the jurisdiction of a party to the arbitration proceeding shall not constitute affiliation within the meaning of this paragraph.

5. The Board may sit in any State or subdivision party to the proceeding, in the State of the taxpayer's incorporation, residence or domicile, in any State where the taxpayer does business, or in any place that it finds most appropriate for gaining access to evidence relevant to the matter before it.

6. The Board shall give due notice of the times and places of its hearings. The parties shall be entitled to be heard, to present evidence, and to examine and cross-examine witnesses. The Board shall act by majority vote.

7. The Board shall have power to administer oaths, take testimony, subpoena and require the attendance of witnesses and the production of accounts, books, papers, records, and other documents, and issue commissions to take testimony. Subpoenas may be signed by any member of the Board. In case of failure to obey a subpoena, and upon application by the Board, any judge of a court of competent jurisdiction of the State in which the Board is sitting or in which the person to whom the subpoena is directed may be found may make an order requiring compliance with the subpoena, and the court may punish failure to obey the order as a contempt. The provisions of this paragraph apply only in States that have adopted this Article.

8. Unless the parties otherwise agree the expenses and other costs of the arbitration shall be assessed and allocated among the parties by the Board in such manner as it may determine. The Commission shall fix a schedule of compensation for members of Arbitration Boards and of other allowable expenses and costs. No officer or employee of a State or local government who serves as a member of a Board shall be entitled to compensation therefor unless he is required on account of his service to forego the regular compensation attaching to his public employment, but any such Board member shall be entitled to expenses.

9. The Board shall determine the disputed apportionment or allocation and any matter necessary thereto. The determinations of the board shall be final for purposes of making the apportionment or allocation, but for no other purpose.

10. The Board shall file with the Commission and with each tax agency represented in the proceeding: the determination of the Board; the Board's written statement of its reasons therefor; the record of the Board's proceedings; and any other documents required by the arbitration rules of the Commission to be filed.

11. The Commission shall publish the determinations of Boards together with the statements of the reasons therefor.

12. The Commission shall adopt and publish rules of procedure and practice and shall file a copy of such rules and of any amendment thereto with the appropriate agency or officer in each of the party States.

13. Nothing contained herein shall prevent at any time a written compromise of any matter or matters in dispute, if otherwise lawful, by the parties to the arbitration proceeding.

Article X. Entry into Force and Withdrawal

1. This compact shall enter into force when enacted into law by any seven States. Thereafter, this compact shall become effective as to any other State upon its enactment thereof. The Commission shall arrange for notification of all party States whenever there is a new enactment of the compact.

2. Any party State may withdraw from this compact by enacting a statute repealing the same. No withdrawal shall affect any liability already incurred by or chargeable to a party State prior to the time of such withdrawal.

3. No proceeding commenced before an Arbitration Board prior to the withdrawal of a State and to which the withdrawing State or any subdivision thereof is a party shall be discontinued or terminated by the withdrawal, nor shall the Board thereby lose jurisdiction over any of the parties to the proceeding necessary to make a binding determination therein.

Article XI. Effect on Other Laws and Jurisdictions

Nothing in this compact shall be construed to: (a) Affect the power of any State or subdivision thereof to fix rates of taxation, except that a party State shall be obli-

gated to implement Article III 2 of this compact; (b) Apply to any tax or fixed fee imposed for the registration of a motor vehicle or any tax on motor fuel, other than a sales tax, provided that the definition of "tax" in Article VIII 9 may apply for the purposes of that Article and the Commission's powers of study and recommendation pursuant to Article VI 3 may apply; (c) Withdrawal or limit the jurisdiction of any State or local court or administrative officer or body with respect to any person, corporation or other entity or subject matter, except to the extent that such jurisdiction is expressly conferred by or pursuant to this compact upon another agency or body; (d) Supersede or limit the jurisdiction of any court of the United States.

Article XII. Construction and Severability

This compact shall be liberally construed so as to effectuate the purposes thereof. The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any State or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any State participating therein, the compact shall remain in full force and effect as to the remaining party States and in full force and effect as to the State affected as to all severable matters.

APPENDIX F

THE MEMORANDUM ORDER OF JUDGE TENNEY DATED FEBRUARY 5, 1974

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A Memorandum Order of Judge Tenney Dated February 5, 1974

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 3438 (CHT)
#40335

UNITED STATES STEEL CORPORATION, *et al.*,
Plaintiffs,

against

MULTISTATE TAX COMMISSION, *et al.*,
Defendants.

TENNEY, J.

Plaintiffs, four corporations which seek to have the Multistate Tax Compact ("Compact") and, in particular, Article VIII of the Compact, declared unconstitutional, have moved pursuant to Fed. R. Civ. P. 23(c) for an order permitting them to maintain this action as a class action under Fed. R. Civ. P. 23(b)(1) and/or (2). In addition, sixteen corporations[1] have moved pursuant to Fed. R. Civ.

1. The Goodyear Tire & Rubber Company; McGraw-Hill, Inc.; International Telephone and Telegraph Corporation; International Paper Company; Eltra Corporation; Bristol-Myers Company; Xerox Corporation; Green Giant Company; Union Carbide Corporation; International Harvester Company; International Business Machines Corp.; NL Industries, Inc.; Bethlehem Steel Corporation; Trans Union Corporation and two of its subsidiaries, Union Tank Car Company and Ecodyne Corporation.

P. 24(b) for an order permitting them to intervene as plaintiffs in the action. For the reasons stated *infra*, both motions are granted and plaintiffs and twelve of the applicants[2] will be permitted to maintain this suit on behalf of all multistate taxpayers who have been or may be threatened with interstate audits by the Multistate Tax Commission ("Commission").

As indicated in an earlier opinion, *United States Steel Corporation, et al.* v. *Multistate Tax Commission, et al.*, 72 Civ. 3438 (S.D.N.Y., Sept. 17, 1973), the Compact was established to achieve greater uniformity in the area of state taxation of interstate businesses and to reduce double taxation. The Compact has been adopted by 21 states. Article VIII of the Compact, adopted by 17 of those states,[3] permits the Commission, the body which administers the provisions of the Compact, to conduct interstate audits and to issue subpoenas in connection with those audits. Plaintiffs seek injunctive and declaratory relief, claiming that:

> (1) the Compact is unconstitutional under Article I, §10, cl. 3 of the United States Constitution because Congress has not given its consent to it;

---

2. The four corporations which will not be permitted to intervene are Bethlehem Steel Corporation, Trans Union Corporation, Union Tank Car Company and Ecodyne Corporation. They joined in the motion to intervene after all legal argument on this motion was completed—October 18, 1973. As discussed more fully in the text, the other twelve corporations are being permitted to intervene as plaintiffs and as class representatives to correct the problem of overbreadth and to permit adjudication in a single action of all of the issues raised in the complaint. Inasmuch as these four corporations would not add anything of substance to this case and the maintenance of this action as a class action will as a practical matter be dispositive of their interests, the Court cannot see any reason why they should be permitted to intervene in this action.

3. Section 1 of Article VIII provides that this article shall be applicable only in those states party to the Compact which specifically adopt the Article by statute.

(2) the Compact is unconstitutional under Article I, §8 of the Constitution because it

(a) encroaches upon an area over which Congress has been given exclusive authority under the United States Constitution and

(b) discriminates against taxpayers engaged in interstate commerce;

(3) the Compact—or more accurately, Article VIII of the Compact—is unconstitutional under the due process and equal protection clauses of the fourteenth amendment because it gives to the 17 states which have adopted it auditing and subpoena powers not otherwise available to them in connection with the performance of intrastate audits; and

(4) the Compact—or more accurately, Article VIII of the Compact—is unconstitutional under the fourth amendment because it requires interstate taxpayers to submit to audits by Commission auditors

(a) who are agents of an unconstitutional body,

(b) who are unqualified under applicable state law and

(c) to whom state confidentiality requirements are inapplicable and unenforceable.

Plaintiffs, which have been ordered to submit to interstate audits by the Commission, ask the Court to declare them proper representatives of a class consisting of all multistate taxpayers who have been or may be threatened with interstate audits by the Commission. It is claimed that the class is so numerous that joinder of all members is impracticable; the questions of law and fact raised by plain-

tiffs' claims are common to and typical of the class; plaintiffs will adequately and fairly represent the class; the prosecution of separate actions would create the risk of inconsistent adjudications establishing incompatible standards of conduct for defendants (Fed. R. Civ. P. 23(b)(1)(A)); adjudications with respect to individual members of the class would as a practical matter be dispositive of the interests of the other members or might substantially impair or impede their ability to protect their interests (Fed. R. Civ. P. 23(b)(1)(B)); and the defendants threaten to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole (Fed. R. Civ. P. 23(b)(2)).

Defendants argue that plaintiffs have not met all of the prerequisites to a class action found in Fed. R. Civ. P. 23(a) because (1) the definition of the purported class is too broad; (2) plaintiffs, large corporations, cannot fairly and adequately protect the interests of many members of the purported class because their interests are antagonistic to the interests of many other interstate concerns; and (3) the claims heretofore designated as 3, 4(b) and 4(c) are not typical of the claims of the purported class and do not involve common questions of law or fact.

Plaintiffs seek to represent all interstate taxpayers who have been or may be threatened with interstate audits by the Commission. However, plaintiffs are subject to taxation in only 11 of the 17 states which have adopted Article VIII. Thus, plaintiffs cannot represent those interstate taxpayers which are subject to taxation under the Compact

by any of the six remaining states which have adopted that provision. *Cf. Gesicki* v. *Oswald,* 336 F. Supp. 371, 373-74. However, sixteen corporations which *are* subject to taxation by the six remaining states have moved pursuant to Fed. R. Civ. P. 24(b) to intervene as plaintiffs in the action. If the twelve corporations which asked for permission to intervene before argument on this motion was completed were allowed to intervene as plaintiffs and as class representatives, then that defect in representation would be cured.

Defendants ask that the motion to intervene be denied because (1) the applicants do not add anything to the nature of plaintiffs' complaint; (2) the applicants make no showing that their interests are not adequately represented; and (3) defendants will be prejudiced because they will now be required to research the laws of six additional states in order to defend against the allegations contained in the third and fourth claims of plaintiffs' complaint.

Under Fed. R. Civ. P. 24(b), the Court must determine whether the applicants' claim and the main action have a question of law or fact in common and whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The applicants, all of which have been ordered to submit to audits by the Commission since the initiation of the instant action, clearly present claims which have questions of law and fact in common with the main action. Indeed, they propose to adopt plaintiffs' complaint in its entirety and would merely supplement it by adding allegations regarding their respective places of incorporation. In addition, their motions have been made at a particularly opportune time. Substantial discovery has not yet taken place and the Court has not yet examined the merits of the case.

It is true, of course, that an applicant should not be permitted to intervene if his participation in the case would not add anything to it. *See, e.g., First Congregational Church* v. *Evangelical & Reformed Church,* 21 F.R.D. 325, 327-28 (S.D.N.Y. 1958); *Kind* v. *Markham,* 7 F.R.D. 265, 266 (S.D.N.Y. 1945). That is not the case here. The applicants' intervention into the action as plaintiffs and as class representatives will, assuming all other requirements of Fed. R. Civ. P. 23 are met, make maintenance of this action as a class action possible and will permit the Court to dispose of all of the legal issues raised by claims 3, 4(b) and 4(c) in one action.

The Court also finds that intervention will not prejudice defendants. Admittedly, defendants' work is made more difficult because they will be required to research the laws of six additional states. However, because eleven of the twelve applicants are represented by plaintiffs' counsel, defendants need not fear being deluged with "additional questions, objections, briefs, arguments, motions and the like which tend to make the proceeding a Donnybook Fair." *Crosby Steam Gage & Valve Co.* v. *Manning, Maxwell & Moore, Inc.,* 51 F. Supp. 972, 973 (D.C. Mass. 1943).

Having found that the problem of overbroadness is cured once twelve of the applicants are permitted to intervene as plaintiffs and as class representatives, the Court will now turn to the second of defendants' arguments—that is, that plaintiffs cannot fairly and adequately represent the

purported class. Under Fed. R. Civ. P. 23(a)(4), the Court must determine whether plaintiffs' (and, for that matter, the twelve applicants') interests are antagonistic to those of the class they claim to represent and, if so, whether those conflicts would interfere with their ability to prosecute this action with that degree of competence and fairness required of them. *See Rosado* v. *Wyman,* 322 F. Supp. 1173, 1192-93 (E.D.N.Y.), *aff'd,* 437 F.2d 619 (2d Cir. 1970), *aff'd,* 402 U.S. 991 (1971).

To defeat plaintiffs' motion, defendants have submitted affidavits which attempt to show that many interstate concerns will benefit from the Compact whereas plaintiffs will profit from its invalidation. For example, it is asserted that medium and small-sized concerns will benefit from the Compact's simplified small business option (Article III)—available in cases in which $100,000 or less of gross receipts are derived from sales within one of the participating states—and from multistate audits, which are less costly for them than the usual state-by-state audits. It is also asserted that certain unidentified large corporations favor the Compact because they will benefit from the Compact's unitary apportionment of income and dividends of multi-corporate enterprises whereas plaintiffs oppose the Compact because they will be taxed more heavily under it.

However real the alleged conflicts may be, they have nothing to do with the subject matter of the action: the constitutionality of the Compact and of Article VIII. *Cf. Berman* v. *Narragansett Racing Ass'n,* 414 F.2d 311, 317 (1st Cir. 1969), *cert. denied,* 396 U.S. 1037 (1970); *Redmond* v. *Commerce Trust Co.,* 144 F.2d 140, 151-52 (8th Cir. 1944),

cert. denied, 323 U.S. 776 (1944); *Frankel* v. *Wyllie & Thornhill, Inc.,* 55 F.R.D. 330, 334 (W.D. Va. 1972); *Dawson* v. *Delaney,* 189 F. Supp. 416, 419 (D. Del. 1960). It simply cannot be inferred that, because some interstate concerns favor certain portions of the Compact and Article VIII of the Compact, they believe them to be constitutional. True, some members of the class may not wish to maintain this suit because of the benefits they hope to achieve if the Court upholds the constitutionality of the Compact and Article VIII. However, resolution of the issues involved here will be dispositive of their rights and obligations, whether or not they approve of the maintenance of this suit. *Cf. Norwalk CORE* v. *Norwalk Redevelopment Agency,* 395 F.2d 920, 937 (2d Cir. 1968); *Davy* v. *Sullivan,* 354 F. Supp. 1320, 1325 (M.D. Ala. 1973); *Snyder* v. *Board of Trustees of University of Illinois,* 286 F. Supp. 927, 931 (N.D. Ill. 1968); *Dawson* v. *Delaney, supra,* 189 F. Supp. at 419. Whatever motives plaintiffs may have in seeking to invalidate the Compact and Article VIII, there is no suggestion that plaintiffs would, because of their antipathy to the Compact, compromise or in any way prejudice the class by failing to pursue all legal remedies available. *Compare Hansberry* v. *Lee,* 311 U.S. 32, 39, 44-45 (1940).

The third argument which defendants make is that several of the claims—those claims heretofore designated as claims 3, 4(b) and 4(c)—arise under different state statutes so that the requirements of Fed. R. Civ. P. 23(a)(2) and (3) are not met. Defendants reason that no member of the purported class can represent other members where resolution of these claims depends upon reference to the law of

seventeen states, some of the state statutes are relevant to the claims of some members of the class while other state statutes are relevant to the claims of other members of the class; and the statutes vary from state to state.

That argument has no merit. Clearly, despite the fact that resolution of claims 3, 4(b) and 4(c) will necessitate investigation of the laws of seventeen states, the claims themselves involve questions of law common to all members of the proposed class; whether the 17 states which have adopted Article VIII unreasonably discriminate against interstate, as opposed to intrastate, taxpayers and whether the effect of Article VIII is to require interstate taxpayers to submit to unconstitutional audits because Commission auditors are unqualified under applicable state law and are not bound by state confidentiality requirements.

Nor can it be contended that plaintiffs' claims are not typical of, or coextensive with, the claims of other members of the purported class. Plaintiffs, the twelve applicants and other members of the proposed class are similarly situated. Their claims arise under Article VIII of the Compact and not, as defendants urge, under the laws of seventeen different states. Moreover, there is nothing which would indicate that plaintiffs are in a unique position so that an interstate audit of plaintiffs, and plaintiffs alone, would be unconstitutional. *Cf. Dale* v. *Hahn*, 440 F.2d 633, 640 (2d Cir. 1971).

It is therefore clear that plaintiffs, aided by the entrance into this action of the twelve applicants, have established all of the prerequisites for a class action (Fed. R. Civ. P. 23(a)(1)-(4)). The Court also finds that the instant action may be maintained as a class action because adjudication of

plaintiffs' and of the twelve applicants' claims will as a practical matter be dispositive of the interests of other interstate taxpayers who have been or may be threatened with audits by the Commission (Fed. R. Civ. P. 23(b)(1)(B)) and the defendants have acted or will act on grounds generally applicable to the class, thereby making appropriate final injunctive or declaratory relief with respect to the class as a whole (Fed. R. Civ. P. 23(b)(2)).

Accordingly, the motion of the twelve corporations to intervene as plaintiffs if the action is granted. In addition, the four corporations which are pesently plaintiffs in the action and the twelve corporations which have been permitted to intervene will be allowed to maintain the action on behalf of all multistate taxpayers who have been or may be threatened with interstate audits by the Commission.

So ordered.

Dated: New York, New York
February 5, 1974

CHARLES H. TENNEY
U.S.D.J.

Supreme Court, U. S.
FILED
APR 25 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-635

UNITED STATES STEEL CORPORATION, et al., on Behalf of Themselves and All Persons Similarly Situated, *Appellants,*

v.

MULTISTATE TAX COMMISSION, et al., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED NOVEMBER 4, 1976
PROBABLE JURISDICTION NOTED FEBRUARY 22, 1977

Supreme Court of the United States

October Term, 1976

No. 76-635

United States Steel Corporation, et al., on Behalf of Themselves and All Persons Similarly Situated,
Appellants,

v.

Multistate Tax Commission, et al., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title omitted in printing)

Relevant Docket Entries

Complaint ..... August 4, 1972

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Affidavit and notice of motion by plaintiffs for an order that the action be maintained as a class action ..... October 5, 1973

Answer .....October 1, 1973

Opinion No. 40335 (Tenney, J.) granting motions of twelve corporations to intervene as plaintiffs and allowing the action to be maintained as a class action .....February 5, 1974

Defendants' notice of motion for a three-judge court and for summary judgment .....June 3, 1975

Memorandum decision and order .... July 8, 1976

Judgment .....July 14, 1976

Plaintiffs' notice of appeal ..... September 7, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title omitted in printing)

Amended Complaint

Plaintiffs, on behalf of themselves and all persons similarly situated, allege for their complaint as follows:

THE PARTIES

1. Plaintiff, United States Steel Corporation, is a Delaware corporation; plaintiff, Standard Brands Incorporated, is a Delaware corporation; plaintiff, General Mills, Inc., is a Delaware corporation; and plaintiff, The Procter & Gamble Distributing Company, is an Ohio corporation. None of the named plaintiffs has its principal place of business in Colorado or in a state of which any individual Commissioner is a citizen.

2. The Multistate Tax Compact (the "Compact") went into effect in its party states on August 4, 1967, when seven states had adopted it. As of the present time, the following states have adopted the Compact: Alaska, Arkansas, Colorado, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, Texas, Utah, Washington and Wyoming. The Compact has not been given the consent of Congress as required by Article I, Section 10, clause 3 of the United States Constitution.

3. The Compact provides for the establishment of the Multistate Tax Commission (the "Commission") to administer its provisions. (Article IV) It provides for the conduct of interstate audits of multistate taxpayers upon the request of a party state or the Commission may offer

to conduct an audit based on its determination that such audit would be "of interest" to a number of party states; and it purports to provide subpoena powers and authority to seek court orders to the Commission in connection with such audits. (Article VIII) In addition, the Compact provides rules for the division of income (Article IV) which are elective with the taxpayer. (Article III) It also provides for use tax credits and vendor reliance on sales and use tax exemption certificates. (Article V) The Compact also provides for the adoption of uniform regulations by the Commission with respect to income tax, capital stock tax, gross receipts tax, or sales or use tax with respect to "any phase of the administration of such law" and the prescription of uniform tax forms. (Article VII).

4. Defendant Multistate Tax Commission has been organized under the provisions of Article VI, Section 1(a) of the Compact. Said Commission has its headquarters at 1909-26th Street, Boulder, Colorado and is a citizen of such State; it also maintains an office at 2 Penn Plaza, New York, New York. Said Commission is, pursuant to Article VI, Section 1(a) of the Compact, composed of one "member" from each party state who is generally the state's chief administrator of the types of taxes to which the Compact applies; each such member is named a defendant herein. Further, pursuant to Article VI, Section 1(f) of the Compact, the Commission has appointed defendant Eugene F. Corrigan, Executive Director. On information and belief, defendant Corrigan is a citizen of the State of Colorado, and each member of the Commission is a citizen of the state of which he is a tax administrator.

JURISDICTIONAL ALLEGATIONS

5. Under color of the Compact and of the laws of various of the party states, defendant Commission, its individual members, and its Executive Director, defendant Corrigan, have threatened and continue to threaten action against

plaintiffs in violaton of the Constitution of the United States and in conflict with the constitutions and laws of the several states. Defendant Commission and defendant Corrigan have demanded that plaintiffs submit to interstate audits to be conducted by said Commission and to turn over their books and records to persons who may not be properly authorized or qualified under state laws to conduct such audits or to receive such books and records and who may not be subject to the confidentiality requirements imposed upon state auditors and to the punishments and penalties provided for breach of such requirements. The Compact and such demands by defendants pursuant to the provisions thereof are invalid under the Compact Clause, Article I, Section 10, clause 3 of the United States Constitution; encroach upon the power of Congress to regulate commmerce among the several states as provided in the Commerce Clause, Article I, Section 8 of the United States Constitution and impose unreasonable burdens on such commerce; violate the due process and equal protection clauses of the Fourteenth Amendment to the Constitution; and violate the Fourth Amendment proscription against unreasonable searches and seizures all as more particularly described below.

6. Unless defendant Commission, its members, and defendant Corrigan are restrained by this Court, the constitutional and statutory rights of plaintiffs, United States Steel Corporation, Standard Brands Incorporated, General Mills, Inc., and The Procter & Gamble Distributing Company, and all others similarly situated, will be immediately and irreparably harmed.

7. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1332 and 1343.

8. This action arises under the Constitution, laws and treaties of the United States and the matter in controversy herein exceeds the sum or value of $10,000.00 exclusive of

interest or costs, insofar as, for example, the costs of submitting to the unconstitutional audit demands of defendants, both on the part of the individual plaintiffs and the class as a whole, would be more than $10,000.00.

9. Jurisdiction lies as well under 28 U.S.C. § 1332 as the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest or costs, as aforesaid, and the controversy is between citizens of different states.

10. Jurisdiction lies as well under 28 U.S.C. § 1343(3) without regard to jurisdictional amount to redress the deprivation by defendants, under color of state law, statute, custom or usage, of rights secured to plaintiffs by the Constitution of the United States.

11. Plaintiffs' action for declaratory and injunctive relief is authorized by (a) 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure which relate to declaratory judgments; (b) 42 U.S.C. § 1983 which authorizes equitable relief for the deprivation under color of law of rights secured to all persons within the jurisdiction of the United States by the Constitution and laws of the United States; and (c) 28 U.S.C. §§ 2281, 2284 providing for injunctive relief against the enforcement, operation or execution of any state statute on the ground of unconstitutionality.

12. This is a proper case for a determination by a three judge court pursuant to 28 U.S.C. §§ 2281, 2284, since plaintiffs seek an injunction against implementation and enforcement of a compact between the states having applicability in several states, and state-wide applicability within each state so adopting it, on the ground that said compact and the implementing statutes are contrary to the Constitution of the United States.

13. Venue lies in the Southern District of New York by virtue of the residence therein of plaintiffs and of defendant Commission and by virtue of the fact that the claim

arises therein, as demands for audits have been directed thereto.

14. Service of process upon defendant Corrigan and defendant Commissioners who are not residents of New York is authorized under Federal Rules of Civil Procedure 4(e) and under New York CPLR §§ 302, 313.

Class Action Allegations

15. Plaintiffs bring this action on their own behalf and on behalf of all other persons similarly situated pursuant to Rule 23(b)(1)(A); 23(b)(1)(B) and 23(b)(2) of the Federal Rules of Civil Procedure.

16. Plaintiffs are members of a class containing, on information and belief, several thousand members consisting of all multistate taxpayers who have been or may be threatened with interstate audits by the Multistate Tax Commission. The class is so numerous that joinder of all members is impracticable. Plaintiffs, who have themselves been subjected to demands to submit to such audits, can fairly and adequately protect the class and are aware of no conflicts of interest among the members of the class. The questions of law and fact raised by plaintiffs' claim are common to and typical of the class, and include the following: (1) whether the Compact is invalid under Article I, Section 10, clause 3 of the United States Constitution; (2) whether the Compact violates Article I, Section 8 of the United States Constitution; (3) whether the Compact violates the Fourteenth Amendment to the United States Constitution; and (4) whether the Compact violates the Fourth Amendment to the United States Constitution.

17. The prosecution of separate actions would create the risk of inconsistent adjudications establishing incompatible standards of conduct for defendants and adjudications with respect to individual members of the class would as a practical matter be dispositive of the interests of the other

members or might substantially impair or impede their ability to protect their interests.

18. The defendants threaten to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

Statement of Claim

19. The Multistate Tax Compact, in enactment and in operation, is in violation to the Constitution of the United States, the constitution of numerous state, and of controlling state law on numerous grounds, including:

A.

20. The United States Constitution, Article I, Section 10, clause 3 provides:

> "No State shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power. . . ."

21. The Multistate Tax Compact has not been given the consent of Congress and thus is invalid under Article I, Section 10, clause 3 of the United States Constitution.

B.

22. Interstate taxation and the power over interstate commerce are inextricably intertwined. Under Article I, Section 8 of the United State Constitution, Congress has the exclusive authority "to regulate Commerce wih foreign Nations, and among the several States. . . ."

23. Interstate taxation should not be the subject of conflicting legislation by the several states.

24. Congressional interest in regulating interstate taxation and in providing uniform standards therefore has been demonstrated by the introduction, consideration and enactment of several bills.

25. The Multistate Tax Compact encroaches upon this area of exclusive federal supremacy and provides not uniform, but disparate, standards in the area of interstate taxation.

26. In addition, the Multistate Tax Compact discriminates against taxpayers engaged in interstate commerce.

27. By reason of the foregoing, the provisions and implementation of the Multistate Tax Compact violate Article I, Section 8 of the United States Constitution.

C.

28. The Multistate Tax Compact fails to provide adequate standards regarding the qualification of Commission auditors, adequate assurance to multistate taxpayers regarding the confidentiality of audit information and adequate remedies to multistate taxpayers with respect to breach of confidentiality of audit information. The Compact purports to give the Commission broad subpoena powers and authority to seek court orders in connection with the performance of interstate audits.

29. Such standards, assurances and remedies are provided to intrastate taxpayers, such broad powers and authority are not available in connection with the performance of intrastate audits, and discrimination against plaintiffs and other members of the class in these respects is in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

D.

30. The Multistate Tax Compact requires plaintiffs and other members of this class to produce their books and records for audit to Commission auditors unqualified under applicable state laws and to whom confidentiality requirements are inapplicable and unenforceable. In addition,

such auditors are agents of a body whose existence is in violation of the United States Constitution, as aforesaid.

31. Defendants' demands for audit in such circumstances constitute demands for unreasonable searches and seizures in violation of the Fourth Amendment to the United States Constitution.

32. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs respectfully pray on behalf of themselves, and all others similarly situated, that this Court:

1. Assume jurisdiction, and convene a three-judge court under 28 U.S.C. §§ 2281, 2284 to determine the merits of this controversy;

2. Determine pursuant to Rule 23(c)(1) of the FRCP that this action may be maintained as a class action;

3. Enter a final judgment pursuant to 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the FRCP declaring that the Multistate Tax Compact is invalid under Article I, Sections 8 and 10 of the United States Constitution, and Amendments Fourth and Fourteenth thereto, under the Constitutions of the several states, and under controlling state law, and declaring that defendant Commission has been established in violation of the United States Constitution; and

4. Enter preliminary and permanent injunctions enjoining the Multistate Tax Commission and the individual defendants, their successors, agents and employees, and all other persons in active concert and participation with them from implementing and enforcing the provisions of said Multistate Tax Compact, whether through the office of the member states or otherwise, enjoining such Commission

from taking any further actions whatsoever, and requiring such Commission to be disbanded.

Dated: New York, New York
January 9, 1973

WHITE & CASE
By /s/ THOMAS MCGANNEY
Thomas McGanney
A Member of the Firm
Attorneys for Plaintiffs
14 Wall Street
New York, New York 10005
(212) 732-1040

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title omitted in printing)

Notice of Motion to Dismiss of Multistate Tax Commission

PLEASE TAKE NOTICE, that the defendants, by their attorneys, will move this Court at Room 618, United States Court House, Foley Square, New York, New York, on the 16th day of February, 1973, at 2:00 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, for an Order, pursuant to Rule 12(b), subdivisions (1), (2), (5) and (6) of the Federal Rules of Civil Procedure vacating the service of the Summons and Complaint, and dismissing the Complaint herein on the grounds that:

1. This Court lacks jurisdiction over the persons of the defendants Multistate Tax Commission and the individual defendants named as Commissioners of the Multistate Tax Commission, because they are immune from suit by reason of the Eleventh Amendment to the Constitution of the United States, and no consent to this suit has been given, as more clearly appears from the affidavit of Eugene F. Corrigan, annexed hereto.

2. This Court lacks jurisdiction over the person of the defendant Multistate Tax Commission, because the purported service on said defendants within the State of New York by service on one of its tax auditors was a nullity; and this Court lacks jurisdiction over the persons of all the defendants herein, because the summons and complaint were served on each of them outside the State of New York, and the Rules of this Court and the applicable laws of the State of New York do not authorize service of such process outside New York on the agencies of other States, or their

officers, in connection with causes of action arising under the tax law of such States, as more clearly appears from the aforesaid affidavit.

3. This Court lacks jurisdiction over the subject matter of the complaint, because this suit seeks to enjoin, suspend or restrain the assessment, levy and collection of taxes under the tax laws of other states, and obtain a declaratory judgment with respect thereto, in contravention of Title 28, Section 1341 of the United States Code, as more clearly appears from the aforesaid affidavit.

4. The complaint fails to state a claim against the defendants upon which relief can be granted.

Dated, New York, New York
December 21, 1972

/s/ JEROME R. HELLERSTEIN; and

HELLERSTEIN, ROSIER & REMBAR
By /s/ JEROME R. HELLERSTEIN
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title omitted in printing)

Reference to the Decision of Judge Tenney on the Motion to Dismiss Dated September 17, 1973

The decision of Judge Tenney on the motion to dismiss, 367 F. Supp. 107 (S.D.N.Y. 1973), has been reproduced as Appendix B, pages 22a-47a, in the separately bound Appendix to the Jurisdictional Statement.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title omitted in printing)

Answer

Defendants in answer to the amended complaint herein allege as follows:

1. Defendants admit all the allegations contained in Paragraphs 4, 12 and 20 of the complaint.

2. Defendants deny all the allegations contained in Paragraphs 6, 7, 10, 11, 17, 18, 19, 22, 23, 24, 25, 26, 27, 29, 30, 31 and 32 of the complaint.

3. Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 1 and 9 of the complaint.

4. Paragraph 2. Defendants admit all the allegations contained in Paragraph 2 of the complaint except that they deny that the consent of Congress to the Compact is required by Article I Section 10, Clause 3 of the United States Constitution.

5. Paragraph 3. Defendants admit all the allegations contained in Paragraph 3 of the complaint, except to the extent that they allege that the interstate audits of multistate taxpayers referred to are authorized with respect to all party States under the Compact, which allegations defendants deny; and defendants allege that such interstate audits are authorized only with respect to party States that specifically provide by statute that Article VIII of the Compact shall be in force in such State. (Article VIII-1).

6. Paragraph 5. Defendants admit the allegations contained in Paragraph 5 of the complaint that defendant Commission and defendant Corrigan have demanded that plaintiffs submit to interstate audits to be conducted by said Commission and to turn over their books and records, and deny all the other allegations in said Paragraph.

7. Paragraph 8. Defendants admit the allegations contained in Paragraph 8 of the complaint, that this action arises under the Constitution of the United States; they deny that this action arises under the laws and treaties of the United States; and allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in said Paragraph.

8. Paragraph 13. Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 13 of the complaint that the residence of the plaintiffs is in the Southern District of New York; defendants deny that the residence of the defendant Commission is in said District and that the claim arises therein, but do not contest the venue of the action in said District in the event it should be determined that this Court has jurisdiction over the persons of the defendants and the subject matter of the complaint.

9. Paragraph 14. Defendants admit the allegations contained in Paragraph 14 of the complaint that the defendant Corrigan and the defendant Commissioners are not residents of New York and deny all the other allegations in said Paragraph.

10. Paragraph 15. Defendants admit the allegations contained in Paragraph 15 of the complaint that plaintiffs bring this action on their own behalf and on behalf of all other persons similarly situated and deny all the other allegations in said Paragraph.

11. Paragraph 16. Defendants admit the allegations contained in Paragraph 16 of the complaint that plaintiffs have themselves been subjected to demands to submit to interstate audits by the Multistate Tax Commission, and that certain other multistate taxpayers have been or may be subject to such demands; they deny the allegations that the questions of law and fact raised by the plaintiffs' claims are common to and typical of the class, except to the extent that such allegations relate to the question as to whether the Compact is invalid under Article I, Section 10, Clause 3 of the United States Constitution; and deny all the other allegations in said Paragraph.

12. Paragraph 21. Defendants admit the allegations contained in Paragraph 21 of the complaint that the Multistate Tax Compact has not been given the consent of Congress, and deny all the other allegations in said Paragraph.

13. Paragraph 28. Defendants admit the allegations contained in Paragraph 28 of the complaint that the Compact purports to give the Commission subpoena powers and authority to seek Court orders in connection with the performance of interstate audits, but they deny the characterization of such audits as broad; and they deny all the other allegations in said Paragraph.

First Defense

14. The defendant, Multistate Tax Commission (hereinafter referred to as "the Commission"), was created by legislation adopted by each of the member States, and it is the agency of the States for carrying out the Multistate Tax Compact (hereinafter referred to as "the Compact").

15. The individual defendants, other than the defendant Eugene F. Corrigan, are the members of the Commission from their respective States, and they are the heads of the respective State agencies charged with the administration of the types of taxes to which the Compact applies, all in accordance with Article VI thereof. The individual defendants, as members of the Commission, are unauthorized to take any action on behalf of the Commission, and the Commission is not authorized to act except as a body, with a majority of the members present, all as provided by Article VI of the Compact.

16. None of the defendants in this action and none of the States which are parties to the Compact has consented to the maintenance of this action.

17. By reason of the foregoing, this Court lacks jurisdiction over the persons of the defendant Commission and all the individual defendants who are members of the Commission, because they are immune from suit by reason of the Eleventh Amendment to the Constitution of the United States.

Second Defense

18. This Court lacks jurisdiction over the subject matter of the complaint, because the plaintiffs in this suit seek to enjoin, suspend or restrain the assessment, levy or collection of taxes under the tax laws of States, and obtain a declaratory judgment with respect thereto, in contravention of Title 28, Section 1341 of the United States Code.

Third Defense

19. Multistate audits of the plaintiffs and other multistate taxpayers by the Commission, conducted in accordance with Article VIII of the Compact, are valid and violate no provision of the Constitution of the United States, even if it should be determined that the Compact is unconstitutional for lack of the consent of Congress by reason of Article I, Section 10, Clause 3 of the Constitution. Article VIII-1 of the Compact provides:

> "This Article shall be in force only in those party States that specifically provide therefor by statute."

The multistate audits which the Commission has sought to make of the plaintiffs and other multistate taxpayers have been restricted to audits authorized by party States to the Compact that have specifically adopted Article VIII of the Compact by statute. Such statutes and the multistate audits made and sought to be made by the Commission of the plaintiffs and other multistate taxpayers are fully within the powers of the States and are valid and constitutional, irrespective of the constitutionality of the Compact under Article I, Section 10, Clause 3 of the Constitution, and do not violate the Commerce Clause, Article I, Section 8, of the Constitution of the United States, or the Due Process or Equal Protection Clauses of the Fourteenth Amendment, or the Unreasonable Searches and Seizures Clause of the Fourth Amendment thereto.

WHEREFORE, defendants demand judgment that the complaint be dismissed, with costs.

Dated: New York, New York
October 1, 1973

/s/ Jerome R. Hellerstein
JEROME R. HELLERSTEIN; and

HELLERSTEIN, ROSIER & REMBAR
By
/s/ Jerome R. Hellerstein
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To: WHITE & CASE
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title omitted in printing)

Reference to the Memorandum Order of Judge Tenney Dated February 5, 1974

The order of Judge Tenney on the motion of sixteen corporations to intervene as plaintiffs and the motion to maintain the suit as a class action has been reproduced as Appendix F, pages 80a-89a, in the separately bound Appendix to the Jurisdictional Statement.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title omitted in printing)

Notice of Motion for Summary Judgment of Multistate Tax Commission

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SIRS:—

Please take notice that upon the annexed affidavit of Eugene F. Corrigan, sworn to June 3, 1975, the exhibit annexed thereto, the plaintiff's statement under Rule 9(g), and upon all of the pleadings and proceedings heretofore had herein, the undersigned will move this Court, at a Term for Motions, to be held before the Honorable Charles L. Brieant, one of the Judges of this Court, at a time and date and at a place to be fixed by the Court, in the United States Courthouse, Foley Square, New York, New York, for:

1. An order, pursuant to Rule 25, of the General Rules of this Court, directing that a hearing be held before a three-judge court; and

2. For summary judgment, pursuant to Rule 56 F.R.C.P., in favor of the defendants and against the plaintiffs and the intervenors, declaring that:—

(a) the plaintiffs and the plaintiffs-intervenors are not entitled to any of the relief requested in the complaint herein;

(b) the Compact drawn in question here, and the legislation of each member state with respect thereto, are constitutional and valid;

(c) the Compact does not require the consent of Congress pursuant to Article 1, Section 10, Clause 3 of the United States Constitution;

(d) the Compact does not encroach upon the exclusive federal supremacy with respect to interstate commerce as provided in Article 1, Section 8 of the United States Constitution;

(e) the Compact does not unconstitutionally discriminate against multistate businesses engaged in interstate commerce under Article 1, Section 8 of the United States Constitution; and

(f) the Compact does not create disparate standards in the area of interstate commerce in violation of any of the plaintiff's constitutional rights under Article 1, Section 8 of the United States Constitution;

(g) the Compact does not in any ways unconstitutionally discriminate against plaintiffs—multistate taxpayers as contrasted with intrastate taxpayers in violation of due process or equal protection or any other provision of the Fourteenth Amendment of the United States Constitution;

(h) the Compact does not violate the Fourth Amendment to the United States Constitution; and

3. Pursuant to Rule 65 FRCP enjoining the plaintiffs, the members of the class which they purport to represent, their successors, agents, servants and employees, and all other persons acting in concert with them, from impeding or in any ways interfering with the Multistate Tax Commission with respect to its attempts to enforce the provisions of the Compact and in auditing the books and records of plaintiffs and other members of the class; or in the alternative;

4. Granting to the defendants summary judgment, pursuant to Rule 56 FRCP, dismissing the complaint and declaring that the Compact, and all state legislation relating thereto, are valid under the United States Con-

stitution and that the Multistate Tax Commission may constitutionally exercise the powers granted to it by the Compact; and

5. Granting to defendant such other and further relief as to the Court may seem just and proper, on the grounds that there is no genuine issue as to any material fact and the defendants are entitled to judgment as matter of law.

Yours, etc.

Dated: New York, N.Y.
June 3, 1975

WILLIAM D. DEXTER and
EATON, VAN WINKLE & GREENSPOON
Attorneys for Defendants

By /s/ SAMUEL N. GREENSPOON
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title omitted in printing)

Rule 9(g) Statement of Multistate Tax Commission

The following constitutes the material facts as to which the defendants contend there is no genuine issue to be tried.

THE PARTIES

This action was commenced by plaintiffs, United States Steel Corporation, Standard Brands, Incorporated, General Mills, Incorporated, and the Proctor and Gamble Distributing Company, on behalf of themselves and all persons similarly situated (Amended Complaint, p. 1). The following additional corporations are intervenor plaintiffs: Bristol-Myers Co., Eltra Corporation, Goodyear Tire and Rubber Company, Green Giant Company, International Harvester Company, International Paper Company, International Tel. & Tel. Corp., International Business Machines*, Xerox*, McGraw-Hill, Inc., N.L. Industries, Inc., and Union Carbide Corporation (Judge Tenney's decision dated February 5, 1974). The plaintiffs are all engaged in business in more than one state and thus subject to the provisions of the Multistate Tax Compact pertaining to interstate business and to taxes imposed by more than one state. (Corrigan Affidavit p. 2)

The defendants in this cause are the Multistate Tax Commission and its Executive Director, Eugene F. Corrigan, who administer the "Multistate Tax Compact" entered into by 21 states by appropriate state legislation. (Amended Complaint, pp. 1-3) Other named defendants are the tax

* It is our understanding that International Business Machines and Xexox will withdraw as intervenor parties.

administrators of the 21 member states which have adopted the Compact.** (Amended Complaint, pp. 1-3) They include the tax administrator for the states of Alaska, Arkansas, Colorado, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, Texas, Utah, Washington, and Wyoming. These tax administrators are named as commissioners of the Multistate Tax Commission from their respective states. (Amended Complaint, pp. 1-3)

The Controversy

The specific controversy in this cause is whether or not the defendants can administer the interstate (joint) audit provisions of the Multistate Tax Compact (the "Compact") in accordance with its terms absent congressional consent of Congress under Article I, Section 10, Clause 3, of the United States Constitution and without denying the plaintiffs and members of the class various constitutional rights as alleged by plaintiffs in their amended complaint (Amended Complaint, pp. 3-4).

More specifically, as contained in their jurisdictional allegations, the plaintiffs allege that under the color of the Compact and of the laws of various of the party states, Defendant Commission, its individual members, and its Executive Director have threatened and continue to threaten action against plaintiffs in violation of their constitutional rights by the demand of the Defendant Commission, its individual members and Defendant Corrigan to have plaintiffs submit to interstate audits to be conducted by the Commission. They further assert that the Compact and the demands by the defendants to turn their books and records over to the Commission auditors for joint audit purposes pursuant to the provisions of the Compact: (i) are

** California will be the 22nd regular member as of January 1, 1976. (Corrigan Affidavit, p. 1).

invalid under the compact clause Article I, Section 10, Clause 3, of the United States Constitution; (ii) encroach upon the power of Congress to regulate commerce among the several states as provided in the commerce clause, Article I, Section 8, of the United States Constitution; (iii) impose unreasonable burdens on such commerce; (iv) violate the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution; and (v) violate the Fourth Amendment proscription against unreasonable searches and seizures (Amended Complaint, pp. 3-4).

In order to determine the validity of these complaints as set forth more fully in the plaintiffs' Amended Complaint, it is necessary to examine the provisions of the Multistate Tax Compact to see what it does and does not do.

The Multistate Tax Compact

(1) The provisions of the Multistate Tax Compact (the "Compact") as enacted by the 21 member states are substantially in the statutory form enacted by the state of Washington which statute is attached to the affidavit of Eugene Corrigan. (Corrigan Affidavit pp. 1, 7-14)

(2) The Compact went into effect in its party states on August 4, 1967, when seven states had adopted it. (Amended Complaint, p. 2)

(3) As of the present time, the states whose tax administrators have been named as defendants and the state of California effective January 1, 1976, have adopted the Compact (Amended Complaint p. 2; affidavit of Eugene Corrigan, p. 1).

(4) The Compact contains twelve Articles (Corrigan affidavit, pp. 7-14).

(5) Article I sets forth the purposes of the Compact. These are to:

1) Facilitate proper determination of state and local

tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.

2) Promote uniformity or compatibility in significant components of tax systems.

3) Facilitate taxpayer convenience in compliance and filing of tax returns and in other phases of tax administration.

4) Avoid duplicative taxation. (Corrigan Affidavit, p. 7)

(6) Article II contains definitions. (Corrigan Affidavit, pp. 6-7)

(7) Article III contains two sections.

a) Section 1 provides in part that:

"Any taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party state . . . may elect to apportion and allocate his income in the manner provided by the laws of such state . . . without reference to this compact, or may elect to apportion and allocate in accordance with Article IV. This election for any tax year may be made in all party states . . . or in any one or more of the party states . . . without reference to the election made in others." (Amended Complaint, p. 2; affidavit of Eugene Corrigan, p. 8)

b) Section 2 allows another option to interstate taxpayers. It provides that each party state or any subdivision thereof which imposes an income tax shall allow a taxpayer meeting certain requirements to file a "short form" and to compute income tax liability on the basis of a percentage of sales volume within the state.

The Commission has no power to enforce this provision. Section 2 is dependent upon its operation by the party state legislatures adopting appropriate legislation. (Corrigan Affidavit, p. 8)

(8) Article IV sets forth the optional apportionment and allocation provisions which the interstate taxpayer is given the option to use for both state and political subdivision income tax purposes as permitted by Article III, Section 1. It sets forth the provisions of the Uniform Division of Income Tax Purposes Act promulgated by the National Conference of Commissioners on Uniform State Laws (see Volume 9a, Uniform Laws Annotated, p. 449) and approved by the American Bar Association. This is the most widely used act for the division of income by the income tax states. It is utilized by nearly two-thirds of the states. (Corrigan Affidavit, pp. 5, 8-10) This article grants no power to the Commission.

(9) Article V adopts certain substantive provisions relating to sales and use tax laws. It provides for use tax credits and vendor reliance on sales and use tax exemption certificates. (Amended Complaint, p. 2)

(10) Article VI pertains to the Multistate Tax Commission. Sections 1, 2, and 4 of this Article involve the creation and internal management of the Commission. These provisions are self-explanatory and are attached (as well as the other provisions of the Compact) to the affidavit of Eugene Corrigan (Corrigan affidavit, pp. 10-11). Section 1 provides for membership on the Commission, voting rights, meetings, personnel, offices, adoption of by-laws, reports, acceptance of gifts and disclosures of the same, etc. (Corrigan affidavit, pp. 10-11) Section 2 provides for the executive committee, advisory and technical committees, and such other committees as the Commission may establish in accordance with the by-laws. (Corrigan affidavit, p. 11) Section 4 deals with the finances of the Commission and provides for a bud-

get of estimated expenditures and the amounts to be appropriated by the member states, a method of apportionment of the budget amounts among the member states, accounting, auditing, etc. (Corrigan affidavit, p. 11)

Section 4 deals with the "powers" of the Commission as follows:

"3. In addition to powers conferred elsewhere in this compact, the commission shall have power to:

(a) Study state and local tax systems and particular types of state and local taxes.

(b) Develop and recommend proposals for an increase in uniformity or compatibility of state and local tax laws with a view toward encouraging the simplification and improvement of state and local tax law and administration.

(c) Compile and publish information as in its judgment would assist the party states in implementation of the compact and taxpayers in complying with state and local tax laws.

(d) Do all things necessary and incidental to the administration of its functions pursuant to this compact." (Corrigan affidavit, p. 11)

(11) Article VII deals with the subject matter of uniform regulations and forms as follows:

"1. Whenever any two or more party states, or subdivisions of party states, have uniform or similar provisions of law relating to an income tax, capital stock tax, gross receipts tax, sales or use tax, the commission may adopt uniform regulations for any phase of the administration of such law, including assertion of jurisdiction to tax, or prescribing uniform tax forms. The commission may also act with respect to the provisions of Article IV of this compact.

"2. Prior to the adoption of any regulation, the commission shall:

(a) As provided in its bylaws, hold at least one public hearing on due notice to all affected party states and subdivisions thereof and to all taxpayers and other persons who have made timely request of the commission for advance notice of its regulation-making proceedings.

(b) Afford all affected party states and subdivisions and interested persons an opportunity to submit relevant written data and views, which shall be considered fully by the commission.

"3. The commission shall submit any regulations adopted by it to the appropriate officials of all party states and subdivisions to which they might apply. Each such state and subdivision shall consider any such regulation for adoption in accordance with its own laws and procedures." (Amended Complaint, pp. 2-3; Corrigan affidavit, pp. 11-12)

(12) Article VIII pertains to interstate audits. (Amended Complaint, p. 2; Corrigan Affidavit, p. 1..) It reads:

ARTICLE VIII. INTERSTATE AUDITS

"1. This article shall be in force only in those party states that specifically provide therefor by statute.

"2. Any party state or subdivision thereof desiring to make or participate in an audit of any accounts, books, papers, records or other documents may request the commission to perform the audit on its behalf. In responding to the request, the commission shall have access to and may examine, at any reasonable time, such accounts, books, papers, records, and other documents and any relevant property or stock of merchandise. The commission may enter into agreements with party states or their subdivisions for assistance in performance of the audit. The commission shall make

charges, to be paid by the state or local government or governments for which it performs the service, for any audits performed by it in order to reimburse itself for the actual costs incurred in making the audit.

"3. The commission may require the attendance of any person within the state where it is conducting an audit or part thereof at a time and place fixed by it within such state for the purpose of giving testimony with respect to any account, book, paper, document, other record, property or stock of merchandise being examined in connection with the audit. If the person is not within the jurisdiction, he may be required to attend for such purpose at any time and place fixed by the commission within the state of which he is a resident: PROVIDED, That such state has adopted this article.

"4. The commission may apply to any court having power to issue compulsory process for orders in aid of its powers and responsibilities pursuant to this article and any and all such courts shall have jurisdiction to issue such orders. Failure of any person to obey any such order shall be punishable as contempt of the issuing court. If the party or subject matter on account of which the commission seeks an order is within the jurisdiction of the court to which application is made, such application may be to a court in the state or subdivision on behalf of which the audit is being made or a court in the state in which the object of the order being sought is situated. The provisions of this paragraph apply only to courts in a state that has adopted this article.

"5. The commission may decline to perform any audit requested if it finds that its available personnel or other resources are insufficient for the purpose or that, in the terms requested, the audit is impracticable of

satisfactory performance. If the commission, on the basis of its experience, has reason to believe that an audit of a particular taxpayer, either at a particular time or on a particular schedule, would be of interest to a number of party states or their subdivisions, it may offer to make the audit or audits, the offer to be contingent on sufficient participation therein as determined by the commission.

"6. Information obtained by any audit pursuant to this article shall be confidential and available only for tax purposes to party states, their subdivisions or the United States. Availability of information shall be in accordance with the laws of the states or subdivisions on whose account the commission performs the audit, and only through the appropriate agencies or officers of such states or subdivisions. Nothing in this article shall be construed to require any taxpayer to keep records for any period not otherwise required by law.

"7. Other arrangements made or authorized pursuant to law for cooperative audit by or on behalf of the party states or any of their subdivisions are not superseded or invalidated by this article.

"8. In no event shall the commission make any charge against a taxpayer for an audit.

"9. As used in this article, 'tax,' in addition to the meaning ascribed to it in Article II, means any tax or license fee imposed in whole or in part for revenue purposes."

(13) Article IX is concerned with arbitration of income tax apportionment and allocation disputes between a taxpayer and party states to prevent multiple or double taxation of any taxpayer's income as a result of non-uniform application of the apportionment and allocation rules under Article IV or substantially identical apportionment or al-

location rules. This Article is not in effect and can be placed in effect only whenever the Commission finds a need for settling disputes concerning apportionments and allocations and it adopts a regulation putting the Article into effect. When in effect, it is optional with the taxpayer to submit any dispute to arbitration. (Corrigan affidavit, pp. 5; 12-13)

(14) Article X states the Compact is in force when enacted by seven states and for other states when they enact the same. It specifies how a state may withdraw from the Compact and sets forth the effect of any withdrawal on liability prior to withdrawal and on arbitration proceedings started prior to withdrawal. (Corrigan affidavit, p. 13)

(15) Article XI provides:

"Nothing in this compact shall be construed to:

(a) Affect the power of any state or subdivision thereof to fix rates of taxation, except that a party state shall be obligated to implement Article III 2 of this compact.

(b) Apply to any tax or fixed fee imposed for the registration of a motor vehicle or any tax on motor fuel, other than a sales tax: PROVIDED, That the definition of 'tax' in Article VIII 9 may apply for the purposes of that article and the commission's powers of study and recommendation pursuant to Article VI 3 may apply.

(c) Withdraw or limit the jurisdiction of any state or local court or administrative officer or body with respect to any person, corporation or other entity or subject matter, except to the extent that such jurisdiction is expressly conferred by or pursuant to this compact upon another agency or body.

(d) Supersede or limit the jurisdiction of any court of the United States." (Corrigan affidavit, p. 13)

(16) Article XII concerns construction and severability and reads:

"This compact shall be liberally construed so as to effectuate the purposes thereof. The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the Constitution of any state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall be held contrary to the Constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining party states and in full force and effect as to the state affected as to all severable matters. [1967 c 125 § 1.]" (Corrigan affidavit, pp. 13-14)

IMPLEMENTATION OF THE COMPACT

1. The Multistate Tax Commission (the "Commission") is an entity created by Article VI of the Multistate Tax Compact (the "Compact") entered into by twenty-two states by the enactment of the provisions of said compact by the respective state legislatures, effective as to California on January 1, 1976 (the 22nd member of the Compact). (Corrigan affidavit, p. 1)

2. Attached to the affidavit of Eugene Corrigan is a copy of the Compact as enacted by the State of Washington which provisions are typical of the Compact provisions enacted by the other 21 member states. (Corrigan affidavit, pp. 1, 7-14)

3. Under the Compact, the Commission consists of one member from each party state who shall be the head of the state agency charged with the administration of the type of taxes to which the Compact applies. (Corrigan affidavit, p. 2)

4. The members of the Commission named as defendants herein are administrators of the states that impose various taxes on plaintiffs and other multistate corporations including income taxes on or measured by net income, gross receipts taxes, capital stock taxes and sales and use taxes. (Corrigan affidavit, p. 2)

5. Neither the Commission nor the members thereof acting in concert have any power to levy taxes, to specify a tax base, to fix tax rates, or to collect taxes from any of the plaintiffs or any other persons whatsoever. (Corrigan affidavit, p. 2)

6. The Compact and the enabling legislation adopted by each member state thereof apply only to multistate businesses subject to taxes in more than one state. They do not apply to any corporation which does business in and pays taxes to only one state. It is this distinction that constitutes the basis of classification of corporate taxpayers under the Compact. (Corrigan affidavit, pp. 2, 7 [Definition of Taxpayer])

7. The plaintiffs are multistate corporations subject to the taxes imposed by member states in two or more of the member states and are thus subject to the provisions of the Compact pertaining to interstate or multistate corporations. (Corrigan affidavit, p. 2)

8. All the members of the Commission and Compact have enacted Article VIII pertaining to interstate (joint) audits by the Commission. (Corrigan affidavit, p. 2)

9. The conduct of a joint audit by the Commission on behalf of member states or subdivisions thereof is at the sole discretion and option of each member state or subdivision thereof. In the event that a member state or subdivision thereof desires to participate in a joint audit of any multistate taxpayer by the Commission, such member state or subdivision thereof may request the Commission to perform the audit on its behalf and in such case the

Commission may conduct such audit in accordance with the provisions of Article VIII of the Compact. (Corrigan affidavit, p. 3)

10. The Commission may refuse the request of a member state or political subdivision thereof to perform a joint audit for the reasons provided in section 5 of Article VIII of the Compact. (Corrigan affidavit, p. 3)

11. Although the Commission may require the attendance of persons within the state where it is conducting an audit or a part thereof or within a member state in which such person resides, at a time and place fixed by it within such state for the purpose of giving testimony with respect to matters in conjunction with a joint audit, the Commission may not punish such person for failure to attend whether such failure is willful or not. (Corrigan affidavit, p. 3)

12. The Commission, in order to obtain audit information from the taxpayer, may apply to any court having jurisdiction and power to issue compulsory process in any state for which it is conducting a joint audit or any member state in which the object of the order being sought is being situated for an order to obtain the information and failure of any person to obey the order of the court is punishable as a contempt of the issuing court. (Corrigan affidavit, p. 3)

13. Information obtained by any audit of the Commission shall be confidential and available only for tax purposes to party states, their subdivisions, or the United States; and such audit information shall be available only in accordance with the laws of the states or subdivisions on whose account the Commission performs the audit and only through the appropriate agencies or officers of such states or political subdivisions. (Corrigan affidavit, p. 4)

14. The laws with respect to the maintenance of records by multistate taxpayers are the laws of the individual member states and the Commission has no power to direct any multistate taxpayer to keep or maintain any particular records or books. (Corrigan affidavit, p. 4)

15. The Commission may not make any charge against any taxpayer by reason of any joint audit. (Corrigan affidavit, p. 4)

16. Any uniform rules, regulations or forms adopted by the Commission are advisory only to the member states and have no binding effect on any member state or any taxpayer whatsoever. Each member state of the Commission has the right and power to reject *in toto*, disregard, amend, or modify any rules, regulations or forms of the Commission; and the rules and regulations or forms of the Commission have no force and effect in any member state unless adopted by such member state in accordance with that state's own laws and procedures for the adoption of rules and regulations or forms. (Corrigan affidavit, p. 4)

17. Individual member states of the Compact retain exclusive control over any and all legislation or administrative actions affecting (i) the rate of tax; (ii) what is included in any tax base, such as what constitutes taxable income or lawful deductions therefrom for income tax purposes; and (iii) the means and methods of determining any tax liability and of collecting any taxes which may be determined to be due any such member state, whether or not the Commission has conducted a joint audit of any taxpayer on behalf of such member state. (Corrigan affidavit, pp. 4-5)

18. Congress, other than by the enactment of minimal jurisdictional standards under Public Law 86-272 has not enacted any statute which in any way regulates or controls the levying and collection of income taxes, sales taxes, use taxes, capital stock taxes or gross receipts taxes by any

state or its political subdivision as pertains to the plaintiffs or corporations similarly situated. (Corrigan affidavit, p. 5)

Dated:

Respectfully submitted,

/s/ William D. Dexter
William D. Dexter
General Counsel,
Multistate Tax Commission

Samuel Noland Greenspoon
Eaton, Van Winkle & Greenspoon
600 - 3rd Avenue
New York, NY 10016

Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title omitted in printing)

Affidavit of Mr. Corrigan on Behalf of Multistate Tax Commission

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EUGENE F. CORRIGAN, being first duly sworn, on oath deposes and says the following to which he is competent to testify as a witness:

1. That he is executive director of the Multistate Tax Commission with its headquarters at 1790—30th Street, Boulder, Colorado 80301.

2. That the Multistate Tax Commission (the "Commission") is an entity created by Article VI of the Multistate Tax Compact (the "Compact") entered into by twenty-two states by the enactment of the provisions of said compact by the respective state legislatures, effective as to California on January 1, 1976 (the 22nd member of the Compact).

3. That attached hereto is a copy of the Compact as enacted by the State of Washington which provisions are typical of the Compact provisions enacted by the other 21 member states.

4. That under the Compact, the Commission consists of one member from each party state who shall be the head of the state agency charged with the administration of the type of taxes to which the Compact applies.

5. That the members of the Commission named as defendants herein are administrators of the states that impose various taxes on plaintiffs and other multistate corporations including income taxes on or measured by net

income, gross receipts taxes, capital stock taxes and sales and use taxes.

6. That neither the Commission nor the members thereof acting in concert have any power to levy taxes, to specify a tax base, to fix tax rates, or to collect taxes from any of the plaintiffs or any other persons whatsoever.

7. That the Compact and the enabling legislation adopted by each member state thereof apply only to multistate businesses subject to taxes in more than one state. They do not apply to any corporation which does business in and pays taxes to only one state. It is this distinction that constitutes the basis of classification of corporate taxpayers under the Compact.

8. That the plaintiff are multistate corporations subject to the taxes imposed by member states in two or more of the member states and are thus subject to the provisions of the Compact pertaining to interstate or multistate corporations.

9. That all the members of the Commission and Compact have enacted Article VIII pertaining to interstate (joint) audits by the Commission.

10. That the conduct of a joint audit by the Commission on behalf of member states or subdivisions thereof is at the sole discretion and option of the member state or subdivision thereof. In the event that a member state or subdivision thereof desires to participate in a joint audit of any multistate taxpayer by the Commission, such member state or subdivision thereof may request the Commission to perform the audit on its behalf and in such case the Commission may conduct such audit in accordance with the provisions of Article VIII of the Compact.

11. That the Commission may refuse the request of a member state or political subdivision thereof to perform a joint audit for the reasons provided in section 5 of Article VIII of the Compact.

12. That although the Commission may require the attendance of persons within the state where it is conducting an audit or a part thereof or within a member state in which such person resides, at a time and place fixed by it within such state for the purpose of giving testimony with respect to matters in conjunction with a joint audit, the Commission may not punish such person for failure to attend whether such failure is willful or not.

13. That the Commission, in order to obtain audit information from the taxpayer, may apply to any court having jurisdiction and power to issue compulsory process in any state for which it is conducting a joint audit or any member state in which the object of the order being sought is being situated for an order to obtain the information and failure of any person to obey the order of the court is punishable as a contempt of the issuing court.

14. That information obtained by any audit of the Commission shall be confidential and available only for tax purposes to party states, their subdivisions, or the United States; and such audit information shall be available only in accordance with the laws of the states or subdivisions on whose account the Commission performs the audit and only through the appropriate agencies or officers of such states or political subdivisions.

15. That the laws with respect to the maintenance of records by multistate taxpayers are the laws of the individual member states and the Commission has no power to direct any multistate taxpayer to keep or maintain any particular records or books.

16. That the Commission may not make any charge against any taxpayer by reason of any joint audit.

17. That any uniform rules, regulations or forms adopted by the Commission are advisory only to the member states and have no binding effect on any member state or any taxpayer whatsoever. Each member state of the

Commission has the right and power to reject *in toto*, disregard, amend, or modify any rules, regulations or forms of the Commission and the rules and regulations or forms of the Commission have no force and effect in any member state unless adopted by such member state in accordance with that state's own laws and procedures for the adoption of rules and regulations or forms.

18. That individual member states of the Compact retain exclusive control over any and all legislation or administrative actions affecting: (i) the rate of tax; (ii) what is included in any tax base, such as what constitutes taxable income or lawful deductions therefrom for income tax purposes; and (iii) the means and methods of determining any tax liability and of collecting any taxes which may be determined to be due any such member state, whether or not the Commission has conducted a joint audit of any taxpayer on behalf of such member state.

19. That Congress, other than by the enactment of minimal jurisdiction standards under Public Law 86-272, has not enacted any statute which in any way regulates or controls the levying and collection of income taxes, sales taxes, use taxes, capital stock taxes or gross receipts taxes by any state or its political subdivision as pertains to the plaintiffs or corporations similarly situated.

20. That Article IV of the Compact sets forth the provisions of the Uniform Division of Income for Tax Purposes Act (UDITPA) promulgated by the National Conference of Commissioners on Uniform State Taxes (see Volume 9a, Uniform Laws Annotated, p. 449) and approved by the American Bar Association. This is the most widely used act for the division of income by the income tax states. It is utilized by nearly two-thirds of the states.

21. That Article IX of the Compact is not in effect.

22. That the Compact became effective in accordance with Article X, section 1 when the seventh member state adopted it on August 4, 1967.

/s/ Eugene F. Corrigan

(Subscription Omitted in Printing)

The Multistate Tax Compact as enacted by the State of Washington, with provisions typical of the Compact as enacted by the member states, was attached hereto. Reference to the Multistate Tax Compact is included in this Appendix at 72, and has been reproduced as Appendix E, pages 54a-79a, in the separately bound appendix to the Jurisdictional Statement.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

Rule 9(g) Statement of Appellants

Except as hereinafter noted, plaintiffs concur with defendants' statement of the material facts as to which there are no genuine issues to be tried, contained in Defendants' Statement Under Rule 9(g) ("Statement").

Both International Business Machines Corporation and Xerox Corporation have withdrawn as intervening parties plaintiff (see Statement, page 1, footnote). A stipulation entered into by all parties and consented to by Judge Brieant on October 20, 1975 dropped both of those companies from the class action. Moreover, the State of Illinois withdrew from the Compact effective August 29, 1975. A stipulation dropping the State Tax Commissioner of the State of Illinois, George E. Mahin, as a defendant in the action has been signed by all parties and has been submitted to Judge Brieant for his consent. There are, therefore, presently 20 party states to the Compact (see Statement, page 2, lines 5, 7) and California will be the 21st party state to the Compact as of January 1, 1976 (see Statement, page 2, footnote). Wherever the Statement reads 21 member states, that number should be 20; and wherever the Statement refers to 22 member states, that number should be 21.

Plaintiffs do not agree with defendants' suggestion that the issues before this Court can be determined by a mere reading of the Compact (see Statement, page 4, lines 1-4). Plaintiffs' amended Complaint is based upon the Compact *and* the *operative effect* of its various provisions. Moreover, plaintiffs contend that, as with any agreement,

whether between private parties or political entities, the actual and potential impact upon multistate taxpayers and interstate commerce of this agreement between several states can be fully understood only in the context of its purpose and operations. Were it otherwise, this Court would be placed in the unlikely and difficult position of having to judge a book by its cover. In this light, plaintiffs submit that the following genuine and material issues exist to be tried:

1. Whether the Compact is an "Agreement or Compact" between states within the meaning of Article I, Section 10, clause 3, of the U.S. Constitution.

2. Whether the Compact is one

> "relating to . . . subjects . . . which the United States can have [any] possible objection or have any interest in interferring with" (Opinion of Justice Field in *Virginia* v. *Tennessee,* 148 U.S. 503 at 517 (1893))

or which

> "might affect subjects placed under the control of Congress, such as commerce and the navigation of public waters, which is included under the power to regulate commerce" (Opinion of Justice Field in *Wharton* v. *Wise,* 153 U.S. 155 at 171 (1894))

and which thus requires the consent of Congress.

3. Whether the withdrawal from the Compact of one party state (Illinois), the repeal of major provisions of the Compact by another party state (Florida), the disenchantment with and probable withdrawal from the Compact of other party states, and the opposition to the Compact of non-party states is such that the Compact holds out no hope of achieving desirable uniformity in state taxation of interstate commerce but, in fact, has added yet another layer of complexity to the detriment of such commerce.

4. Whether the Compact is an attempt to obstruct Federal legislation by attempting to create an illusion of uniformity in state taxation of interstate commerce through the use of Multistate Tax Commission "advisory" tax regulations in the course of conducting interstate audits when, in fact, most of the party states participating in such audits have not adopted such regulations.

5. Whether Multistate Tax Commission auditors, in conducting interstate audits, have followed the Commission's "advisory" regulations without respect to their adoption by the party states participating in such audits, and, for that reason and others inherent in the nature of interstate audits, have failed to take into account numerous differences in the tax laws of such states (including rules with respect to the treatment of business versus non-business income, combined reporting and foreign source income), all with the prior knowledge and implicit consent of such states, with the result that multistate taxpayers have been subjected to arbitrary tax adjustments.

6. Whether the purpose and practical effect of the Commission's use of its "advisory" regulations and other audit policies adopted by it in conducting interstate audits is to circumvent the legislatures of the individual party states and amend the Uniform Division of Income for Tax Purposes Act, as in effect in several of the party states prior to their joining the Compact and as adopted by all of the party states in enacting the Compact, as well as to amend various other non-uniform tax laws of the various party states, with consequent and adverse impact on multistate taxpayers and interstate commerce.

7. Whether the Commission's interstate audit program, as implemented under Article VIII of the Compact, discriminates against and obstructs taxpayers engaged in interstate commerce as described above and in various other respects including:

a. The unfettered authority of the Commission's Executive Director to appoint auditors "irrespective of the civil

service, personnel or other merits system laws of any party state'' (Compact Article VI, Section 1(g)) notwithstanding the fact that regular state auditors are subject to such laws;

b. The lack of familiarity and experience on the part of the Commission's auditors with the diverse tax laws, regulations, interpretations thereof and policies of the various states on behalf of which they conduct interstate audits; the resulting disregard by such auditors of significant differences in such laws, regulations, rulings and policies and need for duplicative follow-up audits; and the consequent inability of taxpayers to resolve differences of opinion at the audit level with the result that multistate taxpayers have been subjected to arbitrary tax adjustments; and

c. The failure of the Compact and its party states to provide for any penalty for improper disclosure by Commission auditors of confidential tax information, this in contrast to such penalties applicable to regular state auditors.

8. Whether the maintenance in the Commission's by-laws, as a condition imposed by the State of California to that state's becoming a party to the Compact on January 1, 1976, of a provision for weighted voting by state population, as well as by one vote per state, affects the distribution of political power among the party states with respect to regulating state taxation of interstate commerce.

Dated: New York, New York
November 10, 1975

WHITE & CASE
/s/ By THOMAS MCGANNEY
A Member of the Firm
Attorney for all Plaintiffs except Plaintiff Eltra Corporation
14 Wall Street
New York, New York

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

Affidavit of Mr. McGanney on Behalf of Appellants

THOMAS MCGANNEY, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and of the firm of White & Case, attorneys for plaintiffs in this action. (White & Case also represents all intervenors other than Eltra Corporation). I make this affidavit in opposition to defendants' motion pursuant to Federal Rule 56 of the Federal Rules of Civil Procedure for summary judgment or, in the alternative, for an injunction pursuant to Federal Rule 65.

2. The instant action was commenced in August, 1972, by the filing of an amended complaint (the ''Complaint'') seeking injunctive and declaratory relief on behalf of plaintiffs and all other multistate taxpayers similarly situated. In essence, the Complaint charges that the Multistate Tax Compact between 20 states is illegal because it has not been approved by Congress and that defendant Multistate Tax Commission, organized under the provisions of that Compact, was and is acting illegally and unconstitutionally by seeking to conduct interstate audits of plaintiffs' books and records. The claim for relief is based first on the violation of the Compact Clause of the Constitution and in addition on the allegation that the Compact and the actions which the Commission seek to take would deprive plaintiffs of their rights under the Due Process, Equal Protection and Commerce Clauses of the Constitution as well as constituting illegal searches and seizures. Named as defendants besides the Commission and its Executive Director, Eugene Corrigan, are the members of the

Commission who are generally the chief tax administrators of party states.

3. Defendants' motion for summary judgment should be denied in light of their failure to carry their burden of demonstrating that there are no genuine disputes as to any material facts. The issues of whether Congressional consent to the Compact is required, whether the Compact encroaches upon Congressional regulation of interstate commerce, whether the operations of the Compact place an undue burden on interstate commerce, whether the operations of the Compact unfairly discriminate against plaintiffs in violation of their rights under the Equal Protection Clause or deprive plaintiffs of due process of law or subjects them to unreasonable searches and seizures are inherently factual in nature. Indeed, the brief which defendants have submitted in support of the instant motion amounts to no more than a rehash of the arguments contained in the briefs they submitted in support of their unsuccessful motion to dismiss the Complaint. In his October 17, 1973 opinion, Judge Tenney in dismissing the motion to dismiss on the merits as "frivolous", emphasized the manifest factual issues raised by the Complaint in holding that

> "The well-settled rule is that a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. [Citation omitted] Both sides have submitted lengthy and erudite briefs discussing the merits of the claims raised in the complaint. The fact that the parties found it necessary to so extensively brief the sufficiency of the claims tells this Court that a decision must await a determination on the merits."

A copy of Judge Tenney's opinion is attached as Appendix A-1 hereto. United States Magistrate Goettel also recognized the extent of the factual dispute when, in his May 14,

1974 opinion on a motion to compel answers to plaintiffs' first set of interrogatories he stated that

> "The sweeping scope of the constitutional challenges to the Compact is such as to make most of the requested information relevant to the pleadings."

A copy of Magistrate Goettel's opinion is attached as Appendix A-2 hereto.

4. Defendant's instant motion is yet another blatant example of their extensive efforts to prevent plaintiffs from developing any sort of a factual record with which a court might intelligently pass upon the complex and important questions raised in plaintiffs' Complaint. Although the Complaint was filed in August, 1972, defendants filed a motion to dismiss necessitating the drafting of extensive briefs. (A copy of the Complaint is attached as Appendix A-3 hereto). On September 19, 1973, as stated above, Judge Tenney denied defendants' motion as "frivolous." It was, thus, not until September, 1973 that defendants' answer was filed.

5. Plaintiffs moved swiftly after Judge Tenney's decision, filing a motion for declaration of a class action on September 25, 1973. Defendants opposed such motion, but in an opinion dated February 5, 1974 Judge Tenney granted plaintiffs' motion permitting them to maintain the action pursuant to Rule 23(b)(1) and/or (b)(2) as class representatives of all multistate taxpayers who have been or may be threatened with interstate audits by the Commission. (A copy of this opinion is attached hereto as Appendix A-4.)

6. On October 19, 1973, plaintiffs in the class action filed their first set of interrogatories composed of 69 separate questions. After requesting numerous extensions of time to answer such interrogatories, on December 20, 1973 defendants filed objections to 50 of the interrogatories, either in whole or in part, leaving only 19 interrogatories unob-

jected to. It was not until March of 1974, five months after the interrogatories were served, that answers to the 19 interrogatories were filed by each of the defendants. Plaintiffs moved on January 17, 1974, for an order overruling defendants' objections to this first set of interrogatories.*

7. In March of 1974, plaintiffs requested from defendants a number of documents referred to in their partial answers to plaintiffs' interrogatories. On October 31, 1974, more than seven months after the original request, the last of these documents was produced by defendants.

8. Finally, again after several requests for extensions of time in which to serve answers to plaintiffs' first set of interrogatories, defendants served their interrogatory answers in September, 1974, nearly one year after the interrogatories were served. Plaintiffs served a second set of interrogatories on March 31, 1975 consisting of 26 narrowly-drawn questions which were designed solely to fill the gaps resulting from defendants' answers to plaintiffs' first set of interrogatories. Defendants predictably objected to all but one of the second set of interrogatories on grounds virtually identical to those which they raised with respect to plaintiffs' first set of interrogatories.

9. Thus until the middle of October 1975, plaintiffs had been successful in obtaining somewhat incomplete answers

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* Defendants' objections, which covered the gamut from relevancy to objections on the grounds of "political confidentiality", were rejected virtually in their entirety on May 14, 1974 by Magistrate Goettel. (A copy of Magistrate Goettel's decision is attached hereto as Appendix A-2.) The sole exception related to contacts between members of the Compact with U.S. Senators and Congressmen regarding Federal legislation. Magistrate Goettel's ruling was upheld by Judge Tenney who, in an order dated June 14, 1974, in fact granted plaintiffs further discovery than that ordered by Magistrate Goettel. In both well-considered decisions it was stressed that a full exposition of the relevant facts is a prerequisite to any decision on the merits of the issues raised by the Complaint.

to one set of interrogatories, had one attorney spend one day each in Boulder, Colorado and Salem, Oregon inspecting limited records of the Multistate Tax Commission and the Oregon Department of Revenue, and had received some documents in response to two requests therefor. A significant number of the documents requested were not provided and substantial deletions were made from a large number of other documents. Recently, on the eve of this motion, defendants Corrigan and the Commission, but not the individual Commissioners, chose to respond, although wholly inadequately, to the limited second set of interrogatories which had been served upon them by plaintiffs. These eleventh hour, incomplete responses, however, were only forthcoming after plaintiffs were forced to seek them by a motion pursuant to Federal Rule 37. Similarly, defendants have at last served a further, but still far from complete, response to plaintiffs' request for documents—but only by producing materials, which, on the alleged ground of political confidentiality, have been redacted beyond the point where they can be of any use to the plaintiffs.

10. In addition, defendants have engaged in a pattern of behavior suggesting an intent to punish the plaintiff class for instituting this suit in the first place. Plaintiffs have become aware of a concerned effort by the Commission to bring about "capitulation" of the individual members of the class of plaintiffs. Attached hereto as Appendices A-5 and A-6 is an exchange of correspondence between the Commission and the Director of Taxation of the State of Hawaii. In the first letter, the Director of Taxation indicates that he does not wish to take certain coercive action dictated by the Commission and notes that "most corporations appear to be in substantial compliance with our income tax law". However, the Commission responded that:

> ". . . the type of action that we have outlined that of proceeding with the matter unless and until some court stops us has resulted, within the last few weeks, in

compliance by several corporations which had previously resisted. One of them is a corporation which has been seeking to join the lawsuit. Its capitulation is particularly significant."

11. Defendants have attempted to force such "capitulation" by serving a series of subpoenas followed by arbitrary tax assessments when several of the plaintiffs in that action refused to comply with such subpoenas. In all such instances, the taxpayers in question offered to submit to audits by regular state auditors or, in the alternative, to extend the statute of limitations pending the outcome of the federal proceeding. Such offers were uniformly refused.

12. As a result, presently pending are the following suits against class members which are virtually mirror images to the instant suit: *Byron L. Dorgan, North Dakota Tax Commissioner,* Petitioner v. *International Harvester Company,* Respondent, Civil No. A1-74-25 (United States District Court for the District of North Dakota) (this suit has been stayed pending the outcome of the instart action); *The Sperry & Hutchinson Company* v. *New Mexico Bureau of Revenue and Fred Ochesky,* Civil No. NY-77-1 (District Court for the State of New Mexico, County of Santa Fe) (the plaintiff was forced to bring this action to enjoin the enforcement of a Commission audit subpoena; an injunction was granted plaintiff pending the outcome of the instant action); *In the Matter of the Tax Appeal of Colgate Palmolive Company,* Case No. 14151 (Tax Appeal Court of the State of Hawaii) (Collection of arbitrary assessment enjoined pending outcome of this instant action); *State Tax Commission,* Plaintiff v. *Union Carbide Corporation,* Defendant, Civ. No. 1-74-73 (this case is in the Idaho State Supreme Court for the County of Ada); *Multistate Tax Commissioner and Eugene F. Corrigan, Executive Director of the Multistate Tax Commissioner,* Petitioners v. *American Can Company,* Respondent, No. C. 75-165T (United States District Court for the Western District of Washington); *Multistate Tax Commission and Eugene F. Corrigan, Executive Director of the Multistate Tax Commission,* Petitioners v. *Sperry Rand Corporation,* Respondent, (recently removed to the United States District Court for the District of Idaho); and *George Kinnear, Director, Department of Revenue, State of Washington, and Multistate Tax Commission,* Plaintiffs v. *The Hertz Corporation,* Defendant, No. 1780-II, (presently pending before the Court of Appeals of the State of Washington, Division II).

13. Judge Tenney, Magistrate Goettel, and recently Judge Brieant so far have thwarted defendants' attempts to obstruct a decision as to the constitutionality of the Compact based on a full record of the relevant facts. We believe that the defendants' instant motion should likewise be denied. In doing so, this Court will permit the parties to establish a complete record for the United States Supreme Court which both sides expect will ultimately decide the issues. While plaintiffs have had only limited success in their pretrial discovery endeavors, our review of such results to date has revealed that the following items numbered (14-22) substantiate plaintiffs' conclusion that factual disputes remain in this case which would preclude granting defendants' motion.

Effect on Interstate Commerce and Requirement of Congressional Consent

14. In an address by Charles H. Mack, Chairman of the Multistate Tax Commission, to the Twentieth Annual Western States Association of Tax Administrators' Conference on October 4-8, 1971, Mr. Mack stated that

> "Its [the Compact's] success is especially surprising when one considers that, unlike some compacts which have over a period of many years been adopted by all of the states, this compact is involved in a controversial subject matter, has an administrative body known as

the Multistate Tax Commission and is activist in nature."

It is such agreements among states of a controversial and activist nature which the framers of the Constitution had in mind in requiring advance Congressional consent with respect to compacts or agreements which might affect matters placed under the control of the Congress.

15. In a letter dated November 9, 1967 from George Kinnear, Chairman of the Multistate Tax Commission, (a defendant in this proceeding) to F. H. W. Hoefke, Chairman of the Oregon State Tax Comission, regarding the Commission's Joint Audits Committee, Mr. Kinnear stated that

> "We are going to have some rough argument over the question of the necessity of a passage of a consent bill *before we can do anything*. This is one area where there might be particular criticism, thus, I believe it is imperative that this committee limit itself in the immediate future to setting up test audits on a multistate basis and to refrain at this time from drafting a total broad plan for multistate audit." [Emphasis added]

By defendant Kinnear's own admission, therefore, the scope of the interstate audit program and the details of its operation, both current and proposed, are relevant to the need for Congressional consent. Moreover, at the Commission's Executive Committee meeting of February 19, 1973, Mr. Frank Beckwith of Colorado stated that "the primary reason for his state's lack of participation [in the interstate audit program] is the belief that a Consent Bill is a prerequisite." Colorado is thus a party state which believes that at least the Commission's activities under Article VIII of the Compact require Congressional consent. The facts concerning the extent of the interstate audit program and the methods and procedures employed in conducting such audits are thus of the utmost relevance.

16. In a letter dated August 18, 1967 from Theodore W. de Looze of the Oregon State Tax Commission to Mitchell Wendell, Counsel, Council of State Governments, regarding the proposed Multistate Tax Commission bylaws, Mr. de Looze stated with respect to interstate audits that

> "Eventually this should be a fertile area for bylaws. Again, although the material is of the nature that, under an ordinary statute, would be covered by regulations, because bylaws may be adopted without further action, their use should be extended as far as possible. To be considered however, is that fact that many of the provisions in Article VIII may require supplementation, the supplementation of which, if violated, would be a violation of law. For example, the Commission might supplement the manner in which it requires the attendance of persons to give testimony, and the like, and in the ordinary state situation this would be done by regulation and the violation of the regulation would be a violation of law. Can the same be said if this is done by a bylaw? Is this a violation of law for which the person could be cited into court?"

Mr. de Looze further indicated that his comments quoted above would apply also to the matter of arbitration under Article IX of the Compact.

On January 25, 1971, the Commission passed the following resolution

> "The regulations which have been issued pursuant to the provisions of Article IX, relating to arbitration proceedings are hereby repealed and the following regulation is hereby adopted;
>
> 1. No arbitration proceeding shall be commenced under this Article, except as provided in Paragraph (2).
>
> 2. This regulation shall not be amended, revised or repealed on less than two-year written notice."

The arbitration of apportionment and allocation disputes under Article IX of the Compact is one of the areas in which the party states have agreed to take joint action.

The extent to which the Commission has adopted or may adopt binding bylaws or regulations other than for the conduct of purely administrative internal affairs of the Commission is relevant to a determination of the extent of the agreement among the party states, the extent of the delegation of authority from the party state to the Commission, the impact of the Compact on multistate taxpayers and interstate commerce and thus to the need for Congressional consent.

17. The State of California has enacted legislation which would make that State a party to the Compact on January 1, 1976 provided that the Commission

> "... has in effect published bylaws for the conduct of its business, copies of which are on file with the Secretary of State of California, and which provide that to be adopted all matters voted upon must receive both a majority of the number of member states and a majority of the total population of all member states according to the current United States Statistical Abstract."

The existence of such a bylaw provision, and the Commission's intentions with respect to the maintenance thereof, are relevant to the distribution of political power among the party states and thus to whether Congressional consent is required.

18. By a resolution adopted September 10, 1971, the Commission recommended to its party states that Article IV of the Compact "be amended to provide that all corporate income subject to tax by the respective taxing jurisdictions shall be apportioned, and that the distinction between 'business' and 'non-business' income shall be abolished." It was further resolved on such date that "any member state not

conforming to the Multistate Tax Compact, as amended, shall automatically become an associate member of the Compact...." In his March 14, 1972 commentary with respect to a proposed bill which would, among other things, give Congressional consent to the Compact, Executive Director Corrigan indicated that

> "They (the party states) have recently indicated that they do feel that need [to revise the current Compact], particularly with respect to dropping the allocation feature of the current compact in favor of a full apportionment feature."

Article IV of the Compact is identical to a provision in the Uniform Division of Income for Tax Purposes Act ("UDITPA") which has uniformly been interpreted to require formula apportionment of business income and specific allocation of non-business income. Article IV of the Compact has never been amended, but the Commission has adopted regulations requiring full apportionment under Article IV. Such regulations are clearly inconsistent with Article IV, the interpretation of that provision in UDITPA and the acknowledged need on the part of many party states to amend Article IV if full apportionment is to be followed. Notwithstanding the above, Commission auditors have applied full apportionment standards in conducting interstate audits.

Such inconsistencies support plaintiffs' contentions that the Compact is an attempt to obstruct Federal legislation by attempting to create an illusion of uniformity in state taxation of interstate commerce through the use of Multistate Tax Commission "advisory" tax regulations in the course of conducting interstate audits when, in fact, most of the party states participating in such audits have not adopted such regulations. Moreover, the manifest result of such an attempt by the Commission is that Multistate Tax Commission auditors, in conducting interstate audits, have

followed the Commission's "advisory" regulations without respect to their adoption by the party states participating in such audits, and, for that reason and others inherent in the nature of interstate audits, have failed to take into account numerous differences in the tax laws of such states (including rules with respect to the treatment of business versus non-business income, combined reporting and foreign source income), all with the prior knowledge and implicit consent of such states, with the result that multistate taxpayers have been subjected to arbitrary tax adjustments.

As regards the approach taken by the Commission with respect to the business vs. non-business income distinction, in a talk given at the June 24-26 meeting of the Multistate Tax Commission, James H. Peters, State and Local Taxation Editor of the Journal of Taxation, stated that

> "I believe that the full apportionment concept in the regulations is an effort to change the Compact law to what Commission members consider to be a preferable approach to allocation and aportionment, rather than a sound interpretation of the Uniform Act. As such, it represents a legislative effort rather than an administrative effort. In my opinion, what we have seen here is a politicalization of the administrative function. I have the impression that representatives of member States tend to view the Commission much as a legislative body (at first somewhat like a Senate but recently, and with the help of California, more like a House of Representatives) and the Compact much like a constitution; that is, a document setting forth broad general principles under which the Commission has almost unlimited freedom to act. Not only is this an incorrect view of the Compact, I for one, believe that there is great danger in it. Administrators are part of the executive branch of State government, and with one notable exception, are not answerable to an electorate. They do not have responsibility for State fiscal policies and should not be engaged in legislative efforts. [Footnote omitted] *In addition, treating the Compact as a broad delegation of legislative power raises a serious issue with respect to intergovernmental relationships and has a very definite bearing on the need for Congressional consent.*" [Emphasis added]

The facts relevant to the necessity of amending Article IV and to the audit activities of the Commission with respect to full apportionment are relevant to the issues of undue burden upon interstate commerce and the need for Congressional consent.

19. In a letter dated February 24, 1971 from Executive Director Corrigan to Donald Theriot of the Louisiana Department of Revenue, Mr. Corrigan referred to the possibility of Louisiana adopting the Compact in a form different from that adopted by the other party states. Mr. Corrigan stated that

> "Several of our member states have expressed concern that any variation which you might enact into the substantive portions of the Compact would tend to vitiate the Compact as an agreement between your state and the other member states."

The substantive portion in question was Paragraph 6 of Article IV of the Compact relating to the specific allocation of capital gains and losses constituting non-business income. Mr. Corrigan concludes that such change could not be made "without jeopardizing the proposed legislation as Compact legislation. . . ." "As one state has commented," stated Mr. Corrigan, "If Louisiana made the substantive changes proposed with respect to paragraph 6, they would have a compact all right, but they would be the only member state of that particular compact." Such facts as the foregoing are relevant to a determination of the extent of the agreement among the party states.

20. In a letter dated February 18, 1972 from Executive Director Corrigan to Charles H. Mack, Director, Oregon Department of Revenue, Mr. Corrigan discussed the prospects for various non-party states adopting the Compact and also the tenuous membership status of certain party states. A copy of that letter is attached hereto as Appendix A-7. The letter presages the recent dramatic decision of the State of Illinois to withdraw from the Compact effective August 29, 1975.

In addition, I am informed and do believe that several other party states are considering or have considered withdrawing from the Compact. For instance, in his answer to one of the interrogatories in the federal proceeding, John J. Sheehan, Commissioner from the State of Nevada, states that he "discussed the possibility of Nevada's withdrawal from the Compact with a Nevada State Assemblyman between December 1962 and February 1973."

The facts relating to membership in the Compact and to states such as Illinois decision to withdraw from the Compact are relevant to a determination of the extent to which the Compact promotes diversity rather than uniformity in state taxation of interstate commerce and thus to the need for Congressional consent and the constitutionality of the Compact under the Commerce Clause of the Constitution. Moreover, the withdrawal from the Compact of one party state (Illinois), the repeal of major provisions of the Compact by another party state (Florida), the disenchantment with and probable withdrawal from the Compact of other party states, and the opposition to the Compact of non-party states all suggest that the Compact not only holds out no hope of achieving desirable uniformity in state taxation of interstate commerce but, in fact, has added yet another layer of complexity to the detriment of such commerce.

DISCRIMINATION AGAINST MULTISTATE TAXPAYERS AND INTERSTATE COMMERCE

21. In a letter dated September 4, 1970 from Harry W. Jury, Director of Field Operations, Revenue Division, Michigan Department of Treasury, to Executive Director Corrigan, Mr. Jury stated that:

> "In regard to the sales and use taxes, we have discussed this with the supervisor of our auditors, auditing multistate taxpayers. It is our determination this would be an almost impossible task. For example: [name of taxpayer omitted] requires approximately 12 examiners one and one-half years to audit their Michigan sales and use taxes. In the event the same auditors audited for all the other states for sales and use tax, it would be an endless task. If we get into multistate retailers, such as, Sears and Roebuck, Firestone Tire and many others, it is necessary to audit a representative number of the retail stores and only with the taxpayer's permission if the test period used is representative may we project such findings for the entire audit period. *Once again we feel this would be en endless task as the sales and use taxes in all the various states are not uniform in application.* [Emphasis added]
>
> "It would be possible to audit for sellers use tax if the proper documentation were maintained at the commercial domicile. Should the proposed audit program include all the taxes mentioned in the compact (income tax, capital stock tax, gross receipts tax, and sales and use taxes) *it would require complete uniformity for all states. Since no uniform laws and rules are prescribed in respect to these taxes, can any single audit group be expected to deal expertly with the myriad laws involved together with their individual rules and regulations by states.* [Emphasis added].
>
> "It appears to us everything that has been done in relation to the multistate compact to date has to do

with allocation and apportionment. There has been a striving for uniformity between states in this regard, *but apparently nothing, or very little, has been done relative to any difference in the tax base between the states.*" [Emphasis added]

Not only the extent of uniformity in tax laws, but also the extent to which the Commission has trained or proposes to train its auditors to cope with differences in state tax laws, is relevant to a determination of the extent of discrimination against interstate taxpayers and the burdens placed by the interstate audit program on interstate commerce and to the need for Congressional consent. In a letter dated September 10, 1970 from Mr. Corrigan responding to Mr. Jury's letter of September 4, 1970, Mr. Corrigan stated that

"Like you, I believe that joint audits have much greater and earlier possibilities in the case of corporation income taxes than in the case of sales and use taxes. I too have difficulty conceiving of a joint audit of a large retail corporation on behalf of a multitude of states. It would appear that a necessary prerequisite would be a requirement that the corporation account for all of its sales with respect to all of the states, by state, as a matter of course. But even that would not appear to be sufficient unless there were substantially more uniformity in the sales and use tax laws in the various states than is presently the case."

It should be noted that many of the plaintiffs in this action are all "large retail corporations" of the type referred to by Mr. Corrigan. Further with respect to this matter, in a memorandum dated September 30, 1970 from John H. Heckers, Executive Director of the Colorado Department of Revenue, to Multistate Tax Commission Regular Member States, Mr. Heckers recalled "what the drafters of the Compact had in mind when they incorporated the idea of co-

operative interstate auditing into the document." Mr. Heckers stated that

"Since it would be technically impossible for even a highly trained corp of auditors hired by the Multistate Tax Commission (even if they could be found) to be intimately informed on the tax laws and interpretations of 50 states, it was felt [by the drafters of the Compact] that we could reasonably expect more success if the expertise of state auditors on their own tax laws would be utilized; for example, a state conducting one of their regular periodic audits on a corporation located in the state would simply pick up for sales tax figures the amount of sales attributed to other states and for income tax figures the amount of income likewise attributed to other states. This listing of sales and income escaping local taxation would simply be forwarded to the Commission headquarters, duplicated and forwarded to each of the affected states. It would be up to each state to apply its own laws in the assessment of taxes.

"The original drafters were dubious as to the powers of the Multistate Tax Commission to introduce its own auditors into field auditing. The Commission could best serve its purpose by acting as an informational central agency."

In a letter dated November 5, 1970 from H. F. Freeman, Executive Secretary, California State Board of Equalization, to Mr. Corrigan, Mr. Freeman stated that "Although I believe that joint auditing in the sales and use tax areas is not practical, it seems to me that it might be feasible to have reciprocal agreements between states under which audits culd be made to establish the facts relating to jurisdiction." And in a letter dated November 16, 1970, from Mr. Corrigan, responding to Mr. Freeman's letter of November 5, 1970, Mr. Corrigan stated that

"I agree with you concerning the impracticability of performing joint audits in the sales and use tax fields at this time. I think we are obliged to continue to assess possibilities in this field and, to the extent possible, to encourage increased uniformity among state sales and use tax statutes. Increased uniformity is certainly a necessary preliminary to successful joint auditing."

In a letter dated November 2, 1971 from John J. Sheehan, Executive Secretary, Nevada Tax Commission, to Eugene F. Corrigan, Executive Director of the Multistate Tax Commission, Mr. Sheehan stated that

"Nevada has had two unfortunate experiences by having an outside entity conduct an out of state audit for it. While we are gun shy, we nevertheless will welcome the opportunity to participate in the development of control procedures to assure the conduct of meaningful audits on an interstate basis. The problem of training auditors to be familiar with the idiosyncrasies of the multitude of Sales and Use Tax Acts will be difficult."

The problem suggested by all these comments is accentuated by the fact that many if not most of the interstate audits thus far performed by the Commission have been performed not by the Commission's permanent personnel, but by state auditors on temporary loan to and under the supervision of the Commission.

22. In a letter dated December 5, 1972 from Executive Director Corrigan to Norman H. Schmitt of the Ohio Department of Taxation regarding Mr. Schmitt's appointment to the Commission's Joint Audit Committee, Mr. Corrigan stated that

"There is one consideration, however, of which we must remain aware. That is that the confidentiality provisions of the states which are participating in our

joint audits generally preclude the sharing or even discussing, of any audit information with personnel of a state which has not entered into a reciprocity agreement with them. We hope that you and the committee will be able to resolve this problem. Meanwhile, it will apparently be necessary to limit your participation in joint audit activities to those matters pertaining to policy and procedure so that we avoid violating any confidentiality statutes among the states."

The extent to which party states participating in the interstate audit program have entered into such reciprocity agreements is, of course, relevant to a determination of the extent to which multistate taxpayers subjected to interstate audits receive the protection of the various state confidentiality statutes.

23. In addition to the above information thus far elicited in the course of pre-trial discovery, neither the Compact nor any Commission bylaw regulation known to me provides for the application of penalties for the wrongful disclosure of confidential tax information by Commission personnel.

24. Moreover, on information and belief, the Commission audit personnel do not satisfy the civil service, personnel and other merit requirements for auditors of all of the Compact party states participating in the interstate audit program. Such inconsistencies support plaintiffs' contentions that the Commission's interests audit program, as implemented under Article VIII of the Compact, discriminates against and obstructs taxpayers engaged in interstate commerce as described above and in various other respects including:

a. The unfettered authority of the Commission's Executive Director to appoint auditors "irrespective of the civil service, personnel or other merit system laws of any party state" (Compact Article VI, Section 1(g)) notwithstand-

ing the fact that regular state auditors are subject to such laws;

b. The lack of familiarity and experience on the part of the Commission's auditors with the diverse tax laws, regulations, interpretations thereof and policies of the various states on behalf of which they conduct interstate audits; the resulting disregard by such auditors of significant differences in such laws, regulations, rulings and policies and need for duplicative follow-up audits; and the consequent inability of taxpayers to resolve differences of opinion at the audit level with the result that multistate taxpayers have been subjected to arbitrary tax adjustments; and

c. The failure of the Compact and its party states to provide for any penalty for improper disclosure by Commission auditors of confidential tax information, this in contrast to such penalties applicable to regular state auditors.

25. Lastly, the Compact has not received the consent of Congress notwithstanding the introduction in Congress of several bills which, if enacted, would give such consent. Such consent is required, even under Mr. Justice Field's *dictum* in *Virginia* v. *Tennessee,* 148 U.S. 503 (1893) and *Wharton* v. *Wise,* 153 U.S. 155 (1844), for those agreements and compacts which may affect interstate commerce. That the Multistate Tax Compact may so effect interstate commerce is clear from the Report of the Senate Finance Committee with respect to Public Law 86-272 referred to in Appendix B-1

> "This lack of coordination and uniformity in state taxation of interstate commerce has resulted in the creation of sprawling diverse revenue systems with underlying potential for great harm to the economy of the country and to the individual taxpayers to such an extent that urgent remedial action appears necessary.

> "Repeated efforts over the years, in the form of advisory commissions and committees, have failed to satisfactorily resolve the current tax dilemma. Your committee feels that much of the failure experienced in these attempts has been occasioned by the ambitious objectives sought by these groups in the broad area of intergovernmental conflict. The fruits of such efforts have, of course, been enlightening but, unfortunately, have not served to abate existing revenue trends.
>
> "The duplication and, indeed, even the triplication in the field of income taxation, requires that prompt attention be given to the dangers inherent in the widespread exploiting of tax sources among the governmental levels."

And the Report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary, also referred to in our brief, summarized the system for state taxation of interstate commerce as follows:

> "This, then, is an assessment of the State income tax system and its effect on interstate commerce in the United States today. It is the picture of a system which works badly for both business and the States. It is the picture of a system in which the States are reaching farther and farther to impose smaller and smaller liabilities on more and more companies. It is the picture of a system which calls upon tax administrators to enforce the unenforceable and the taxpayer to comply with the uncompliable.
>
> • • •
>
> "Certainly, the problems presented are not easy problems, but they are important problems. *They are important to the States and they are important to the viality* [sic] *of the American common market. Congress has a responsibility to both, and it is time for it to seek a solution.* (Emphasis added.)
>
> • • •

"A prescribed system as widely disregarded as the present one cannot be said to be one which the interests of the States demand be preserved intact at all costs. *At the same time the interests of the nation in a free flow of commerce, unhampered by needless interference, clearly call for a change.*" (Emphasis added.)

It is respectfully requested that the motion for summary judgment, or in the alternative, for injunctive relief, be denied in all respects.

/s/ THOMAS MCGANNEY
Thomas McGanney

(Subscripton Omitted in Printing)

The appendices referred to in this Affidavit are part of the record and have not been reproduced here.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title omitted in printing)

Reference to the Opinion of the District Court Dated July 8, 1976

The opinion of the three-judge District Court in this case, 417 F. Supp. 795 (S.D.N.Y. 1976), has been reproduced as Appendix A, pages 1a-21a, in the separately bound Appendix to the Jurisdictional Statement.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title omitted in printing)

Reference to the Judgment of the District Court Dated July 14, 1976

The Judgment of the District Court has been reproduced as Appendix C, pages 48a-50a, in the separately bound Appendix to the Jurisdictional Statement.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title omitted in printing)

Reference to the Notice of Appeal

The Notice of Appeal, filed September 7, 1976, has been reprduced as Appendix D, pages 51a-53a, in the separately bound Appendix to the Jurisdictional Statement.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title omitted in printing)

Reference to the Multistate Tax Compact

The Multistate Tax Compact as proposed for enactment has been reproduced as Appendix E, pages 54a-79a, in the separately bound Appendix to the Jurisdictional Statement.

Supreme Court, U. S.
FILED
DEC 1 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1976

76-635

UNITED STATES STEEL CORPORATION, ET AL., ON BEHALF OF THEMSELVES AND ALL PERSONS SIMILARLY SITUATED,

Appellants,

vs.

MULTISTATE TAX COMMISSION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM UNDER RULE 16

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IN THE

SUPREME COURT

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UNITED STATES

OCTOBER TERM, 1976

UNITED STATES STEEL CORPORATION, ET AL., ON BEHALF OF THEMSELVES AND ALL PERSONS SIMILARLY SITUATED,

Appellants,

vs.

MULTISTATE TAX COMMISSION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, the Appellees respectfully move that this Court affirm the judgment of the three-judge District Court below on the ground that it is manifest that the questions on which the decision of this cause depend are so unsubstantial as to not need further argument; or, in the alternative, to dismiss

the appeal herein for lack of a substantial federal question.

STATEMENT OF APPELLEES' POSITION

The appellant attack the Multistate Tax compact on the ground it requires congressional consent for its validity. The lower court, on authority of this court's recent decision in *New Hampshire* v. *Maine*, ... U.S. ....., 48 L. Ed. 2d 701, 96 S. Ct. 2113 (June 14, 1976), held that the Multistate Tax Compact does not require congressional consent for its validity. It based its holding on findings, specifically supported by the undisputed record in this cause, that the Compact does not shift any political power among the states or encroach upon federal supremacy.

The Appellants sought to raise other issues in the lower court pertaining to the impact of the Compact on interstate commerce and their rights under the Fourteenth Amendment (due process and equal protection) and Fourth Amendment (unreasonable searches and seizures). These issues were also properly disposed of by the court below. Appellants' position on these issues are spurious and totally without merit. Appellants have abandoned them except for the unsupported factual claim that the Compact unreasonably burdens interstate commerce. Clearly, then, as the Appellees assert, there is no question raised in this appeal requiring any further consideration by this court. The well-reasoned opinion of the three-judge court below (Jur. St., App. A, pp. 1a-21a) correctly and adequately disposes of all the issues in this cause.

STATEMENT OF THE CASE

Appellant's Statement of the Case is incomplete, misleading and contains numerous statements of fact and opinion not supported by the record.

This action involves the validity of the Multistate Tax Compact (hereinafter referred to as the "Compact") on its face. In their Amended Complaint (included herein as Appendix A), the Appellants asserted that the Compact violated certain provisions of the United States Constitution and sought declaratory and injunctive relief against its enforcement. The Appellees, asserting that only questions of law were involved, moved for a summary judgment and requested that the motion be heard by a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284.

As required by local court rule 9(g), in support of Appellees' motion for summary judgment, Appellees filed a "Statement Under Rule 9(g)" supported by the Affidavit of Eugene Corrigan, Executive Director of the Multistate Tax Commission (the governing body created under the Compact and hereinafter referred to as the "Commission") and documents of unquestioned authenticity. The Appellees' Statement Under Rule 9(g) is appended hereto as Appendix B. There is no dispute as to any material fact in this cause including the facts in the 9(g) statement and Corrigan affidavit as well as the documents.

The provisions of the Compact (Jur. St., App. E, pp. 54a-79a) are analyzed in the Rule 9(g) Statement and in the lower court opinion (Jur. St., App. A, pp. 4a-9a). As indicated in the 9(g) Statement, the Commission is the administrative agency for the Compact created by Article VI of the Compact. (App. B, p. 25a). In reference to the powers and duties of the Commission under the Compact, the following statements are significant:

1. Neither the Commission nor the members thereof acting in concert have any power to levy taxes, to specify a tax base, to fix tax rates, or to collect taxes from any of the appellants or any other person whatsoever. (App. B, p. 25a; Jur. St., App. A, p. 11a).

2. The conduct of a joint audit by the Commission on behalf of member states or subdivisions thereof is at the sole discretion and option of each member state or subdivision thereof. In the event that a member state or subdivision thereof desires to participate in a joint audit of any multistate taxpayer by the Commission, such member state or subdivision thereof may request the Commission to perform the audit on its behalf and in such case the Commission may conduct such audit in accordance with the provisions of Article VIII of the Compact. (App. B, p. 26a; Jur. St., App. A, p. 11a).

3. Individual member states of the Compact retain exclusive control over any and all legislation or administrative actions affecting (i) the rate of tax;

(ii) what is included in any tax base, such as what constitutes taxable income or lawful deductions therefrom for income tax purposes; and (iii) the means and methods of determining any tax liability and of collecting any taxes which may be determined to be due any such member state, whether or not the Commission has conducted a joint audit of any taxpayer on behalf of such member state. (App. B, p. 28a; Jur. St., App. A, pp. 11a-12a).

4. Any uniform rules, regulations or forms adopted by the Commission are advisory only to the member states and have no binding effect on any member state or any taxpayer whatsoever. Each member state of the Commission has the right and power to reject *in toto*, disregard, amend, or modify any rules, regulations or forms of the Commission; and the rules and regulations or forms of the Commission have no force and effect in any member state unless adopted by such member state in accordance with that state's own laws and procedures for the adoption of rules and regulations or forms. (App. B, p. 28a; Jur. St., App. A, p. 11a).

It is further significant that Congress, other than by enactment of minimal jurisdictional standards under Public Law 86-272 has not enacted any statute which in any way regulates or controls the levying and collection of income taxes, sales taxes, use taxes, capital stock taxes or gross receipts taxes by any state or its political subdivision as pertains to

the plaintiffs or corporations similarly situated. (App. B, p. 28-29; Jur. St., App. A, pp. 12a-13a).

After analyzing the constitutional issues in light of the undisputed facts raised herein by the Appellants, the three-judge court below held:

> "* * * we find the Compact to be lawful, and the Compact's creation, the Commission, to be a lawfully constituted body." (Jur. St., App. A, p. 20a)

The court based its holding upon the following undisputed findings:

1. The Compact does not tend to increase the political power of the member states or encroach upon or interfere with federal supremacy and therefore does not violate the Compact Clause. (Jur. St., App. A, pp. 11a, 12a)

2. The Compact does not unreasonably burden or discriminate against interstate commerce. (Jur. St., App. A, pp. 14a, 20a)

3. The Compact does not deny Appellants equal protection or due process of law. (Jur. St., App A, p. 20a)

4. The Compact does not subject Appellants to unreasonable searches and seizures. (Jur. St., App. A, p. 20a)

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED AND THE QUESTIONS ON WHICH THE DECISION OF THIS CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS TO NOT NEED FURTHER ARGUMENT.

The opinion of the three-judge court below clearly demonstrates that the constitutional issues raised by appellants in this cause have been conclusively adjudicated against appellants' position by previous decisions of this court. Therefore, this court should either affirm the opinion of the lower court, or dismiss the appeal for lack of a substantial federal question.

A. This court's recent decision in New Hampshire v. Maine, supra, ... U.S. ....., 48 L. Ed. 2d 701, 96 S. Ct. 2113 (June 14, 1976), and other cases applying the test laid down in Virginia v. Tennessee, 148 U.S. 503 (1893), conclusively establish that the Multistate Tax Compact in question does not require congressional consent under Article I, § 10, clause 3 of the United States Constitution because it does not increase the political power of the States or interfere with the just supremacy of the United States.

The Appellants mistakenly assert that the Multistate Tax Compact is invalid for lack of congressional consent under by Article I, § 10, clause 3 of the United States Constitution, which reads in material part:

> "No State shall, without the Consent of the Congress * * * enter into any Agreement or Compact with another State, or with a foreign power * * *"

The applicable test in determining whether a compact or agreement among the states requires congressional consent was set forth by this court in the

early case of *Virginia* v. *Tennessee*, 148 U.S. 503 (1893), *supra*:

> "Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." (148 U.S. 419)

This test was reaffirmed as the controlling test in *New Hampshire* v. *Main*, *supra*, ... U.S. ....., 48 L. Ed. 2d 701, 96 S. Ct. 2113 (June 14, 1976), and has been quoted with approval in *Wharton* v. *Wise*, 153 U.S. 153 (1894); *Sterns* v. *Minnesota ex rel. Marr*, 179 U.S. 223 (1900); and *Louisiana* v. *Texas*, 176 U.S. 1 (1900).

In applying this test, interstate agreements in aid of state taxation have been held valid without congressional consent.[1] In fact, the Multistate Tax Compact itself has been held valid by three other

[1] *Dixie Wholesale Grocery Company* v. *Martin*, 278 Ky. 105, 129 S.W. 2d 181 (1939) (Upheld agreement between Kentucky and Ohio for exchange of information re interstate shipment of cigarettes by holding that compact consent requirement "only applies to political alliances which may encroach upon the supremacy of the United States." (278 Ky. 711, 129 S.W. 2d 184)); *Robert Tobacco Co.* v. *Department of Revenue*, 322 Mich. 519, 34 N.W. 2d 54 (1949) (Upheld agreement similar to that involved in *Dixie Wholesale Grocery*, *supra*, on authority of that case and *Virginia* v. *Tennessee*); *Bode* v. *Barrett*, 412 Ill. 204, 106 N.E. 2d 521 (1952) (Upheld reciprocity motor vehicle licensing legislation on authority of *Dixie Wholesale Grocery*, *supra*, and *Virginia* v. *Tennessee*, *supra*); *Bode* v. *Barrett*, 344 U.S. 583 (1953) (The Supreme Court in affirming the Illinois Supreme Court noted that the kind of reciprocal arrangements involved therein "has never been thought to violate the Compact Clause of Art. I, § 10 of the Constitution.")

courts in addition to the court below against claims that it required congressional consent.

In *Kinnear, et al.* v. *The Hertz Corporation*, 86 Wn. 2d 407, 545 P.2d 1186 (1976), the Supreme Court of Washington unanimously upheld the Compact against the same constitutional arguments raised here by the Appellants by an analysis of the constitutional questions comparable to that employed by the three-judge court below. Cf. *Multistate Tax Commission, et al.*, Petitioners v. *Sperry Rand Corporation*, Respondent, United States District Court for the District of Idaho, No. 1-76-168 (by order dated October 26, 1976, the District Judge upheld the joint audit provisions of the Multistate Tax Compact here in question by granting Petitioners' motion for summary judgment; and *Dorgan*, Petitioner v. *International Business Machines Corp.*, Respondent, and *Dorgan*, Petitioner, U.S. District Court for the District of North Dakota, Southwestern Division, Nos. A1-74-24 and A1-74-25, respectively (by order dated October 7, 1976, the District Court held that the Respondents were required to make their books and records available for audit by auditors of the Multistate Tax Commission).

Other types of interstate agreements not directly relating to the power of taxation have also been ruled valid under the *Virginia* v. *Tennessee* test without congressional consent.[2]

[2] *Fisher* v. *Steele*, 39 La. Ann. 447, 1 So. 882 (1887); *Dover* v. *Portsmouth Bridge*, 17 N.H. 200 (1845); *Union Branch R.R. Co.* v.

To our knowledge, there has never been any case which has attempted to limit or criticize the rule of *Virginia* v. *Tennessee*.[3] It has even been cited in debates in Congress over congressional consent as expressing the settled rule of law. See, e.g., Debate on Congressional Consent to the Southern Regional Educational Compact, 94 Cong. Record, Senate, pp. 5561, 5485.

In light of the above cases and in particular this court's recent decision in *New Hampshire* v. *Maine*, *supra*, 48 L. Ed. 2d 701, S. Ct. 2113, the only question in regard to the consent issue is whether or not the Compact tends to increase the political power of the member states in a manner which may encroach upon the just supremacy of the United States. The Compact in question clearly does not do so.

As the lower court held, the Compact confers only advisory and recommendatory powers on the

E.T. & Ga. R.R. Co., 14 Ga. 327 (1853); *Ham* v. *Maine-New Hampshire Interstate Bridge Authority*, 92 N.H. 268, 30 A.2d 1 (1943); *State* v. *Doe*, 149 Conn. 216, 178 A.2d 27 (1962); *Landes* v. *Landes*, 1 N.Y.2d 358, 135 N.E.2d 562, 153 N.Y.S.2d 14, appeal dismissed 352 U.S. 948 (1956).

In *Union Branch R.R. Co.*, *supra*, which was decided prior to *Virginia* v. *Tennessee*, *supra*, the court noted:

> "(1) In our opinion, this prohibition (The Compact Clause) applies only to such an 'agreement or compact' as is in its nature political; or * * * conflicts with the powers which the States, by the adoption of the Federal Constitution, have delegated to the General Government." (14 Ga. 339) (Material in parenthesis added)

[3]In speaking of the rule of *Virginia* v. *Tennessee*, Engdahl, in an article on Compacts in the Michigan Law Review, noted that the rule "* * * has long been acquiesced in by the Supreme Court and by every inferior court which has considered the problem, as well as virtually every modern commentator." (64 Mich. L. Rev. 74)

Commission (the administrative agency created by the Compact to administer its provisions). The Compact leaves completely intact the individual member states' power over its sole subject matter, that of state and local taxes of multistate businesses. As found by the court below: "The member states have ceded no sovereignty over tax matters to the Commission." (Jur. St., App. A, p. 14a)

The Compact does not interfere with any congressional power, including the power to regulate interstate commerce. An examination of the Compact (Jur. St., App. E, pp. 54a-79a) makes it clear that it is not the type of agreement or compact which requires congressional consent for its validity.[4]

[4]The purposes of the Compact are stated in its text: to facilitate the proper determination of state and local tax liability of multistate taxpayers, to promote uniformity of state tax systems, to facilitate convenience in taxpayer compliance, and to avoid duplicative taxation. (Jur. St., App. A, p. 5a) To carry out these purposes the multistate taxpayers are given an option to elect to apportion and allocate their income under the Uniform Division of Income for Tax Purposes Act. (Articles III and IV; Jur. St., App. A, p. 5a) Smaller multistate taxpayers are given an option to simplify their tax reporting by electing to pay on their receipts from sales in lieu of the tax on their income. (Article III-2; Jur. St., App. A, pp. 5a-6a) To avoid double sales or use tax, credits for taxes paid in other states are granted; and the member states have agreed to honor sales and use tax resale or exemption certificates furnished the vendor by his customer. (Article V; Jur. St., App. A, p. 6a)

The Commission is authorized to adopt uniform regulations for the taxes dealt with by the Compact, but these are merely advisory and are not binding on any state. (Article VII; Jur. St., App. A, p. 11a) There is also a provision for setting up machinery for arbitrating controversies between multistate taxpayers and the states under the Uniform Division of Income for Tax Purposes Act provisions or comparable provisions. (Article IX; Jur. St., App. A, p. 8a) This article is not presently in force.

Finally, there is Article VIII, which provides for the multistate audits under attack in this case. There is not the slightest warrant for

Under the Compact, the member states administer their own tax laws and do not delegate any of their ultimate authority to anyone. The Compact does not encroach upon the federal domain or shift power among the states. Each state, independent of the Compact, has the power to adopt uniform legislation, to audit Appellants' books and records on its individual account, to grant multistate taxpayers certain options in the determination of their tax liability, and to enter into reciprocal joint audit agreements with other states. By adoption of the Compact, each state, in enacting certain substantive tax law in concert with other states, has retained complete and absolute control over its own tax system. Furthermore, each state has the inherent power to delegate audit responsibilities to a third party. (Jur. St., App. A, pp. 11a-12a)

The attempt by the legislatures of twenty-one states to improve tax administration by creating the Commission as a purely advisory and recommendatory agency could not possibly alter the political balance among the states or between the states and the federal government.[5]

contending that the multistate audits "tend to increase the political power in the states" in a manner that encroaches upon or interferes with "the federal supremacy." (Jur. St., App. A, pp. 11a-12a) Surely, the way in which states administer their taxes, whether by use of their own auditors or Commission auditors, is within their domain.

[5]The Compact promotes policies that are in the interest of the federal government and have been pursued by that government itself.

The federal government has a profound interest in improving administration of state taxes. This has been made painfully clear by the intense pressures on the national government to come to the

We submit that the Compact and the implementation of its joint audit provisions are fully within the power and domain of the states. These provisions in no way shift political power among the states or encroach upon or interfere with the federal supremacy. Consequently, congressional consent is not required for their implementation. The federal government and the individual states retain the same power and the same supremacy with the Compact in force as they have without the Compact.

In sum, based upon the provisions of the Com-

rescue of state and local governments because of their inability to meet burgeoning budgets for education, health, welfare, crime, drug addiction, and the like, the latest manifestation of which is the enactment by Congress of the revenue sharing program. Moreover, collaboration between state-federal-local governments as a means of improving tax administration, is a policy that has long been pursued and encouraged by the national government. For example, the Advisory Commission on Intergovernmental Relations was established by Congress in 1959 *inter alia* to: "Recommend methods of coordinating and simplifying tax laws and administrative practices to achieve a more orderly and less competitive fiscal relationship between the levels of government and to reduce the burden of compliance for taxpayers." (PL 380, 86th Congress, 1st session).

The federal interest in improving state tax administration is evidenced by the tax information exchange agreements now in force between the Internal Revenue Service and the states. (See P-H Federal Taxes, § 35, 443, 15 (1972). For a description of the background and development of this program see "Intergovernmental Cooperation in Tax Administration," Advisory Commission on Intergovernmental Relations (June, 1961, A-7).)

The collaborative audit technique employed by the Commission in making multistate audits is likewise employed by the federal and state governments under the agreements. And the purposes, as stated in the Standard Federal-State Tax Agreement, are essentially the same as those of the multistate audits here at issue, namely, to achieve "minimum duplicate audit effort, increase federal and state audit coverage, minimum taxpayer contact and optimum revenue results." See IRS-State Model Agreement on Coordination of Tax Administration, P-H Federal Taxes, § 55, 295 (4) (1970).

pact and their operative effect and based upon the uniform decisions of this court including *Virginia* v. *Tennessee*, *supra*, and *New Hampshire* v. *Maine*, *supra*, it is clear that there is posed no federal question in reference to the "congressional consent" issue which requires further consideration by this court.

B. **This appeal presents no substantial federal question under the commerce, equal protection and due process clauses of the United States Constitution because the Compact does not unreasonably burden interstate commerce or unconstitutionally discriminate against multi-state taxpayers.**

In addition to the "congressional consent" question, Appellants below attempted to pose questions under the commerce, equal protection and due process clauses of the United States Constitution by arguing that the Compact unduly burdens or discriminates against multistate taxpayers as compared to intrastate taxpayers. In their Jurisdictional Statement, Appellants argue only that the Compact unreasonably burdens interstate commerce (Jur. St., pp. 25-26) and that the advisory role of the Commission somehow may result in denying them Fourteenth Amendment rights (Jur. St., p. 27). The interstate commerce and Fourteenth Amendment (equal protection and due process) arguments of Appellants have been adequately dealt with in the opinion below. (Jur. St., App. A, pp. 13a-20a) We believe that this opinion is so persuasive as to require little, if any, further argument.

Assuming arguendo, that there are differences in the standards applicable to multistate taxpayers under the Compact and applicable to intrastate taxpayers under member state laws, various principles of constitutional law prevent Appellants from successfully relying on those differences to invalidate the Compact.[6]

Appellants must establish that the alleged differences are significant and result in an actual or threatened injury which denies them constitutional rights. *Re 620 Church Street Building Corp.*, 299 U.S. 24, 27 (1936); *Plymouth Coal Co.* v. *Pennsylvania*, 232 U.S. 531, 544, 545 (1914). *General Trading Co.* v. *State Tax Commission*, 322 U.S. 335, 338 (1944). A distinction in form is not sufficient. *Gregg Dyeing Co.* v. *Query*, 286 U.S. 472 (1931).

This court has upheld a variety of differences between state taxes as they pertain to multistate business as compared to intrastate businesses against the argument that these differences deny multistate taxpayers constitutionally protected rights. Appellees are aware of no decision of this court that has even hinted that administrative differences in determining the tax liability of multistate businesses, as compared to intrastate businesses, violate any federal constitutional rights of multistate businesses.

In *Henneford* v. *Silas-Mason Co.*, 300 U.S. 577

[6]The lower court specifically held: "The different treatment, if any, accorded multistate taxpayers by the Compact is a permissible legislative response to what is perceived as the different circumstances of the multistate taxpayer." (Jur. St., App. A, p. 20a)

(1937), and in *Nelson* v. *Sears Roebuck & Co.*, 312 U.S. 359 (1940) this court noted that the methods used to collect taxes imposed upon multistate businesses there involved were different from those used to collect taxes imposed upon intrastate businesses. These differences were deemed immaterial by the court.[7] There is thus nothing in the commerce clause discrimination cases that would lend support to the argument that the differences between the Compact standards in relation to multistate taxpayers and member state standards in relation to intrastate taxpayers are significant under the commerce clause.

In order for Appellants to establish that the compact denies them equal protection or due process of the law, they must establish that multistate taxpayers cannot be classified differently from intrastate taxpayers. However, such classification is permissible unless it is arbitrary and capricious; and unless no imagined set of facts would justify the classification. *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973); *Madden* v. *Kentucky*, 309 U.S. 83 (1939); *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522 (1959).

[7] In fact, this court has upheld tax statutes as nondiscriminatory as to interstate businesses so long as comparable taxes are imposed somewhere along the tax chain on intrastate businesses. *Hinson* v. *Lott*, 75 U.S. 148 (1869); *Gregg Dyeing Co.* v. *Query*, *supra*; *Henneford* v. *Silas-Mason Co.*, *supra*; *Alaska* v. *Artic Maid*, 366 U.S. 199 (1961); *General American Tank Car Corp.* v. *Day*, 270 U.S. 199 (1961); *Cashey Baking Co.* v. *Virginia*, 313 U.S. 117 (1941); *Nelson* v. *Sears Roebuck & Co.*, *supra*. In fact, the identical tax burden is not required to be placed on interstate businesses as compared to intrastate businesses. *General American Tank Car Corp.* v. *Day*, *supra*; *Alaska* v. *Artic Maid*, *supra*.

Multistate businesses, by the very nature of their activities within a particular state, must of necessity be treated differently than purely local businesses. This court can take judicial notice of the fact that the problems involved in auditing a multistate-multinational corporation with national and international operations are vastly different from those involved in auditing the local grocery store. This alone disposes of the argument that the compact denies Appellants equal protection or due process of law. The differences applicable to intrastate taxpayers as compared to interstate taxpayers are based on a reasonable classification. The reason is that they rest on "some ground of difference having a fair and substantial relation to the object of the legislation." (*Stebbins* v. *Riley*, 268 U.S. 137, 142 (1925))

The important consideration here is that under the compact multistate taxpayers and intrastate taxpayers retain the same substantive rights concerning state and local taxation. *Metropolitan Co.* v. *Brownell*, 294 U.S. 580 (1935); *American Motors Insurance Co.* v. *Starnes*, ... U.S. ....., 96 S. Ct. 1800 (May 19, 1976). There is no claim here that they have not. Thus, there is no merit to the Appellants' equal protection and due process arguments.

In sum, as found by the three-judge court below, the Appellants' commerce clause, due process clause and equal protection clause arguments are totally lacking in merit and raise no substantial federal

question which requires further consideration by this court.

C. Appellants' argument that the questions at issue are substantial ignores the import of this court's recent decision in New Hampshire v. Maine, supra, and the import of the well-reasoned three-judge opinion below and is replete with misstatements of fact and irrelevant, erroneous contentions and argument; and demonstrates a lack of a substantial federal question in this cause.

Appellants argue that there are three substantial federal questions presented, namely, whether the Compact requires the consent of Congress for its validity (Jur. St., pp. 10-24); whether it unconstitutionally burdens interstate commerce (Jur. St., pp. 25-26); and whether it denies multistate taxpayers equal protection and due process of law (Jur. St., p. 27). In arguing the "congressional consent" question, Appellants depict the Compact Commission as a powerful organization that is transforming the interstate taxation system without regard to the substantive tax laws of the member states. This argument is replete with misstatements of fact which ignore the absence of any power in the Commission to fix or determine any tax liability or issue any rules, regulations, determinations or recommendations that are in any way binding on any taxpayer or any state. However, in arguing that the Compact unreasonably burdens interstate commerce and violates equal protection and due process of law restrictions, the Appellants argue that the lack of power in the Commission and its purely advisory role results in the violation of these constitutional provisions.[8]

Inconsistency is not the only defect in Appellants' argument. The main defect in Appellants' argument is that it is not based upon any facts in the record in this cause and has nothing to do with the question of whether the Compact is invalid on its face. In commenting on the type of factual material set forth in Appellants' Jurisdictional Statement, the three-judge court below noted:

> "No contention is made that the Compact is being administered other than according to its terms, except as to particulars governed by the substantive tax law of the respective party states. The constitutional issues posed by this complaint reduce themselves to questions of law.
>
> "Certain of the issues of fact which plaintiffs would seek to raise are purely hypothetical and speculative. As to these issues, plaintiffs have not 'set forth specific facts showing there is a genuine issue for trial.' Rule 56(e), F.R.Civ.P. Certain other claimed issues of fact are plainly not material to the determination of the merits of the constitutional arguments raised here, although they may be of academic interest to

[8]This inconsistency in the Appellants' argument was noted by the three-judge court below in responding to the Appellants' commerce clause argument:

> "Plaintiffs' characterization here of a compact binding only a loose and powerless confederation stands in sharp contrast to their simultaneous characterization of the Compact as intruding upon the federal supremacy and increasing the political power of the states." (Jur. St., App. A, p. 14a)

> the various states in determining whether to join or continue membership in the Compact." (Jur. St., App. A, p. 3a)

In arguing that there are substantial federal questions to be resolved by this appeal, the Appellants completely ignore the opinion of the court below and make no reference to any specific provisions of the Compact or any fact in the record in this cause. If the court below had been wrong in any respect, we can be sure the Appellants would have highlighted such error. Furthermore, if any provision of the Compact or any fact in the record in this cause would support the Appellants' argument, we are equally sure the Appellants would have called it to the attention of this court. In short, the Appellants have sought to reach beyond the provisions of the Compact, the record in this cause and the opinion of the court below and have engaged in an effort to create a substantial federal question where none exists.

Appellants set forth unsupported, erroneous and inconsistent statements pertaining to substantive tax matters and to the work of the Commission in their Jurisdictional Statement and attempt to conclude therefrom that the Compact is invalid under the United States Constitution. While it would unduly lengthen this motion to address all of the statements which are in error, we will address some of the more egregious of Appellants' misstatements.

In arguing that the Compact requires congressional consent, the Appellants do not face the fact

that this court in *New Hampshire* v. *Maine, supra,* specifically affirmed as a rule of law the dictum in *Virginia* v. *Tennessee, supra*:

> "The application of the Compact Clause is limited to agreements that are 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.' *Virginia* v. *Tennessee*, 148 U.S. 503, 519, 37 L. Ed. 537, 13 S. Ct. 728 (1893). Whether a particular agreement respecting boundaries is within the Clause will depend on whether 'the establishment of the boundary line may lead or not to the increase of the political power or influence of the States affected, and thus encroach or not upon the full and free exercise of Federal authority.' Id., at 520, 37 L. Ed. 537, 13 S. Ct. 728. *See Wharton* v. *Wise*, 153 U.S. 155, 168-171, 38 L. Ed. 669, 14 S. Ct. 783 (1894)." (48 L. Ed. 2d 707)

Thus, contrary to Appellants' argument, the *Virginia* v. *Tennessee* test, *supra*, as affirmed by this court in *Wharton* v. *Wise*, 153 U.S. 155 (1894), is settled law.

In sum and substance, the Appellants, in regard to the "congressional consent" issue, have sought to weave a fiction of an omnipotent commission created under the Compact. Contrary to the Appellants' statement on page 10 and throughout their Jurisdictional Statement, the Compact does not create an

independent and regional administrative body.[9] The Commission has no independent power or authority. As has always been the case, the power remains in each state in accordance with its laws, procedures and administrative practices.

Appellants admit on page 15 of their Jurisdictional Statement that the member states individually have the power to do much of what is accomplished by the Compact and Commission and also that the Commission acts in a purely advisory capacity. It is thus clear, notwithstanding the Appellants' argument, that *New Hampshire* v. *Maine*, *supra*, decides the "congressional consent" issue.

Nevertheless, Appellants argue at some length that the Compact is invalid for the lack of congressional consent. This argument is full of conjecture and speculation. It is based on the erroneous premise that the Commission, as a matter of administrative practice, has adopted invalid rules and regulations and procedures in violation of the Compact and the substantive tax laws of the member states. These are

[9]Appellants argue that these efforts of the Commission are regional efforts primarily of the Western States and that they are strongly opposed by the other states. (Jur. St., pp. 16-17) Such argument overlooks the composition of the member states and the fact that the governors of the states of Alabama, Arizona, Georgia, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, Oklahoma, Pennsylvania, Tennessee and West Virginia have authorized their respective states to participate in the deliberations and activities of the Commission as associate members of the Compact. Section 13 of the By Laws of the Commission provides for associate membership and provides that associate members have a right to full participation in the activities and the work of the Commission, except that they have no formal vote. There are thus 34 states in all parts of the Nation which are participating in the activities of the Commission.

serious, totally unwarranted and erroneous conclusions of the Appellants own choosing.

On pages 6 and 16 of the Jurisdictional Statement, the Appellants assert that the Commission is transforming the interstate taxation system by adopting regulations calling for "combined reporting and full apportionment of nonbusiness income." This is in error. The only regulations adopted by the Commission pertain to Article IV of the Compact; that is, the implementation of the Uniform Division of Income for Tax Purposes Act contained therein. Neither Article IV nor the regulations promulgated thereunder have anything to do with combined reporting. Rather, they specifically provide for the allocation of nonbusiness income.

On pages 17-18 of the Jurisdictional Statement, the Appellants assert that:

> "The Multistate Tax Commission has adopted rules and practices which call for the use of 'combined reporting' and the 'unitary business' concept. Under these regulations, a taxpayer and its affiliated corporations (whether or not the latter are subject to the states' tax jurisdiction) are required to file a tax return reporting the entire net income of the whole group."

Again, inasmuch as the Commission has adopted no combined reporting or unitary business regulations, this statement is completely in error.

On page 18 of the Jurisdictional Statement in Footnote 15, the Appellants assert that the unitary

business and combined reporting concepts have been criticized in Congress. Appellants fail to note that the unitary business and combined reporting concepts and full apportionment of all income of affiliated corporations were recommended in the reports referred to in footnote 15 and were incorporated in HR 11798, 89th Cong., 2nd Sess. (1966).[10]

On page 19 of the Jurisdictional Statement, the Appellants state:

> "The Commission has also issued regulations eliminating the distinction between business and nonbusiness income."

On page 20 of the Jurisdictional Statement in footnote 20, Appellants state again that the Commission's regulations require combined reporting and full apportionment of nonbusiness income.[11] Again, these

[10]The report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary House of Representatives in House Report No. 952, 89th Cong., 1st Sess., at page 1154, noted that:

> "Often corporations which are controlled directly or indirectly by the same interests are so mutually dependent on each other for their success that the books of an individual corporation cannot accurately reflect the corporation's contribution to the profitability of the entire multicorporate enterprise."

It then recommended at page 1155 of the same report that:

> "State tax administrators be allowed to require consolidation in any case where two or more corporations are affiliated by common ties of more than 50% of stock ownership and at least one of the affiliates has realty or an employee in the state."

At page 1144 of the report, the subcommittee further recommended:

> "* * * that formula apportionment be used as the sole method of dividing income among the states for tax purposes, without the use of specific allocation or separate accounting."

[11]If the Appellants were correct in their contention, which they weave throughout their argument pertaining to the "congressional consent" question, that the Commission has adopted rules and regulations pertaining to the "combined reporting" and "unitary" con-

statements are simply incorrect. The Commission's regulations do not require combined reporting or full apportionment of nonbusiness income. Section 1 of Article IV of the Compact defines "business" income and "nonbusiness" income. It requires, as does the Commission regulations, that nonbusiness income be subject to specific allocation and that business income be subject to apportionment under the three-factor formula contained in Article IV of the Compact.[12]

cepts, we fail to see how this would raise a substantial federal question. These are concepts approved by the judiciary and indeed found to be necessary to properly apportion the income of multistate-multinational corporations to the respective states. See *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113 (1920); *Bass, Retcliff & Gretton* v. *State Tax Commission*, 266 U.S. 271 (1924) and *Butler Bros.* v. *McColgan*, 17 Cal.2d 664, 11 P.2d 334, aff'd 315 U.S. 501 (1941); *Edison California Stores* v. *Colgan*, 30 Cal.2d 472, 183 P.2d 16 (1947); *Superior Oil Company* v. *Franchise Tax Board*, 34 Cal. Rptr. 545, 386 P.2d 33 (1963). For a recent discussion on "combined reporting" see Frank M. Keesling, "A Current Look at the Combined Report and Uniformity in Allocation Practices" 42 *Journal of Taxation* 106 (Feb. 1975). Cf. "Multinational Corporations and Income Allocation under Section 482 of the Internal Revenue Code, 89 Harvard L. Rev. 1202.

[12]Section 1 of Article IV of the Compact (Jurisdictional Statement, Appendix E, p. 58a) defines nonbusiness income as all income other than business income and defines business income as "income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations." The regulations of the Commission implement this language.

The regulations contain examples of nonbusiness income subject to specific allocation. For example, Reg. IV.1.(c)(4) Example (vi) reads: "The taxpayer is engaged in a multistate glass manufacturing business. It also holds a portfolio of stock and interest-bearing securities, the acquisition and holding of which are unrelated to the manufacturing business. The dividends and interest income received are nonbusiness income." (Seventh Annual Report, Multistate Tax Commission (1974), Appendix J)

On page 20 of the Jurisdictional Statement, the Appellants assert:

> "Finally, the Commission does not allocate income under its regulations and practice to a state which does not tax such income. This 'nowhere income,' as it is called by Mr. Corrigan, is instead apportioned so as to be taxed, again increasing the cost of interstate business and negating the decision of a sister state to stimulate its economy through tax incentives."

This is not correct. Under the Commission regulations and Article IV of the Compact, income is assigned to those states which have jurisdiction to tax regardless of whether or not they actually tax that income.

On page 22 of the Jurisdictional Statement, the Appellants state that:

> "The methods of the Commission are contrary to those embodied in bills proposed in Congress after lengthy study of interstate taxation by congressional committees."

This statement is incorrect. Appellants are apparently referring to "combined reporting" and full apportionment of all income. As heretofore indicated, H.R. Rept. No. 952, 89th Cong., 1st Sess., Vol 4 (1965), which contains the recommendations resulting from the extensive study of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary of the House of Representatives, recommended full apportionment of all

income and recommended "combined" reporting or "consolidated" reporting of the income of the members of an affiliated group.[13] This is the only congressional study that has made any specific recommendations in these areas.

On pages 23 and 24 of the Jurisdictional Statement, the Appellants argue that the Compact and Commission interfere in the conduct of foreign affairs by requiring combined reporting. Inasmuch as neither the Compact nor the Commission requires this, such argument is without any factual foundation.[14]

On pages 25 and 26 of the Jurisdictional Statement, the Appellants attribute all of the difficulties inherent in state taxation of multistate- multinational businesses to the Commission because the Commission lacks the power Appellants would attribute to it in making their compact clause argument. The argument of Appellants on pages 25 and 26 of the Jurisdictional Statement is not supported by any facts. They are appropriately answered by the three-judge court below as follows:

> "The stated purposes of this Compact, *supra*, are to promote uniformity among state tax systems, ease taxpayer compliance and minimize the risk

[13]See footnote 10, *supra*, and H.R. 11798, 89th Cong., 2nd Sess. (1966) which embodies the Subcommittee's recommendations.

[14]It should be further noted that though the Congress has considered various aspects of the problems associated with state and local taxation of multistate businesses, the Congress has taken no policy position on any of the matters touched upon in the Jurisdictional Statement. To date, Congress has left the states free to deal with these problems. It has taken a "hands off" policy.

of duplicative taxation of the multistate taxpayer. Plaintiffs contend that the Compact promotes disparity, not uniformity. In support of this contention, plaintiffs argue that the voluntary nature of Compact membership and the fact that only twenty-one states have joined necessarily limits its reach. Plaintiffs further argue that the advisory powers granted to the Commission are insufficient to override the differences in the substantive tax laws of the party states. Plaintiffs' characterization here of a compact binding only a loose and powerless confederation stands in sharp contrast to their simultaneous characterization of the Compact as intruding upon the federal supremacy and increasing the political power of the states. That the Compact may promise more than it has as yet achieved is no ground for finding unconstitutionality. The member states have ceded no sovereignty over tax matters to the Commission. The fact that the Compact might promote a consensus among party states on principles of allocation of revenues or other matters, does not create an impermissible burden upon interstate commerce. This is so for at least two reasons: first, even without the Compact, the states could enact parallel or uniform tax legislation, as has been done with UDITPA itself; and second, any agreement between two or more states to observe an identical principle of state tax law diminishes the existing possibility of fifty disparate state tax results. In sum, we find no merit to the contention that the Compact is any unconstitutional

burden on interstate commerce." (Jur. St., App. A, pp. 14a-15a)

In the last analysis, what the Appellants object to is the cooperative efforts of the states to identify the problems associated with state income taxation of multistate-multinational businesses and to provide for a common uniform solution of those problems.[15] However, this objection of Appellants does not raise any substantial federal question.

SUMMARY OF APPELLEE'S POSITION

The issue in this cause is not how the Compact is administered by the Commission. Rather, it is whether or not the Compact which creates the Commission and prescribes its responsibilities, authorities, and duties is totally invalid on its face. The Appellants' Jurisdictional Statement is not responsive to this question.

Placing this case in its proper perspective makes it clear that the Compact does not require the consent of Congress because it does not result in any shift of political power among the states or in any manner encroach upon or interfere with the supremacy of the federal government. The long-standing rule of *Virginia* v. *Tennessee*, *supra*, which

[15]The court may well wonder why the Appellants have mounted such a strident attack upon the Compact and the Commission created thereunder. The answer is simply this: Appellants are well aware of the fact that joint audits, conducted in accordance with uniform guidelines consistent with the laws of the member states participating in the joint audits, will reveal much more tax liability to such member states than individual state audits by non-uniform, ill-defined guidelines.

was recently affirmed by this court in *New Hampshire* v. *Maine*, *supra*, irrefutably disposes of this issue.

The commerce clause, due process of law and equal protection of law issues are also summarily disposed of by examination of the provisions of the Compact. There is absolutely nothing in the Compact that supports the contention that it unreasonably burdens interstate commerce or that it denies multistate taxpayers equal protection or due process of law.

It is therefore respectfully submitted that the three-judge court below properly analyze and dispose of all the issues raised in this cause by the Appellants concerning the validity of the Compact.

CONCLUSION

It is respectfully submitted that the questions on which the decision of this cause depend are so unsubstantial as not to need further argument; and that indeed most of the assertions which the Appellants make are completely unsupported by the record. Of the questions which Appellants raise: Question 1 has been conclusively resolved by this court's recent decision in *New Hampshire* v. *Maine*, *supra*; and Questions 2, 3 and 4 raise no real issue at all insofar as the record herein is concerned.

Wherefore, it is respectfully requested that this court either approve the opinion of the court below and affirm that court's judgment, or dismiss this appeal.

DATED this 29th day of November, 1976.

Respectfully submitted,

WILLIAM D. DEXTER
Bank of Olympia Building
Olympia, Washington 98501

SAMUEL N. GREENSPOON
600 - 3rd Avenue
New York, New York 10016

APPENDIX A

AMENDED COMPLAINT

Class Action

Index No. 72/3438

CASE ASSIGNED TO JUDGE TENNEY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES STEEL CORPORATION, *et al*

Plaintiffs,

v.

MULTISTATE TAX COMMISSION, *et al*

Defendants.

Plaintiffs, on behalf of themselves and all persons similarly situated, allege for their complaint as follows:

THE PARTIES

1. Plaintiff, United States Steel Corporation, is a Deleware corporation; plaintiff, Standard Brands Incorporated, is a Delaware corporation; plaintiff, General Mills, Inc., is a Delaware corporation; and plaintiff, The Procter & Gamble Distributing Company, is an Ohio corporation. None of the named plaintiffs has its principal place of business in Colorado or in a state of which any individual Commissioner is a citizen.

2. The Multistate Tax Compact (the "Compact") went into effect in its party states on August 4, 1967, when seven states had adopted it. As of the present time, the following states have adopted the Compact; Alaska, Arkansas, Colorado, Florida,

Hawaii, Idaho, Illinois, Indiana, Kansas, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, Texas, Utah, Washington and Wyoming. The Compact has not been given the consent of Congress as required by Article I, Section 10, clause 3 of the United States Constitution.

3. The Compact provides for the establishment of the Multistate Tax Commission (the "Commission") to administer its provisions. (Article IV) It provides for the conduct of interstate audits of multistate taxpayers upon the request of a party state or the Commission may offer to conduct an audit based on it determination that such audit would be "of interest" to a number of party states; and it purports to provide subpoena powers and authority to seek court orders to the Commission in connection with such audits. (Article VIII) In addition, the Compact provides rules for the division of income (Article IV) which are elective with the taxpayer. (Article III) It also provides for use tax credits and vendor reliance on sales and use tax exemption certificates. (Article V) The Compact also provides for the adoption of uniform regulations by the Commission with respect to income tax, capital stock tax, gross receipts tax, or sales or use tax with respect to "any phase of the administration of such law" and the prescription of uniform tax forms. (Article VII).

4. Defendant Multistate Tax Commission has been organized under the provisions of Article VI, Section 1(a) of the Compact. Said Commission has

its headquarters at 1909 - 26th Street, Boulder, Colorado and is a citizen of such state; it also maintains an office at 2 Penn Plaza, New York, New York. Said Commission is, pursuant to Article VI, Section 1(a) of the Compact, composed of one "member" from each party state who is generally the state's chief administrator of the types of taxes to which the Compact applies; each such member is named a defendant herein. Further, pursuant to Article VI, Section 1(f) of the Compact, the Commission has appointed defendant Eugene F. Corrigan, Executive Director. On information and belief, defendant Corrigan is a citizen of the State of Colorado, and each member of the Commission is a citizen of the state of which he is a tax administrator.

JURISDICTIONAL ALLEGATIONS

5. Under color of the Compact and of the laws of various of the party states, defendant Commission, its individual members, and its Executive Director, defendant Corrigan, have threatened and continue to threaten action against plaintiffs in violation of the Constitution of the United States and in conflict with the constitutions and laws of the several states. Defendant Commission and defendant Corrigan have demanded that plaintiffs submit to interstate audits to be conducted by said Commission and to turn over their books and records to persons who may not be properly authorized or qualified under state laws to conduct such audits or to receive such books and records and who may not be subject to the confiden-

tiality requirements imposed upon state auditors and to the punishments and penalties provided for breach of such requirements. The Compact and such demands by defendants pursuant to the provisions thereof are invalid under the Compact Clause, Article I, Section 10, clause 3 of the United States Constitution; encroach upon the power of Congress to regulate commerce among the several states as provided in the Commerce Clause, Article I, Section 8 of the United States Constitution and impose unreasonable burdens on such commerce; violate the due process and equal protection clauses of the Fourteenth Amendment to the Constitution; and violate the Fourth Amendment proscription against unreasonable searches and seizures all as more particularly described below.

6. Unless defendant Commission, its members, and defendant Corrigan are restrained by this Court, the constitutional and statutory rights of plaintiffs, United States Steel Corporation, Standard Brands Incorporated, General Mills, Inc., and The Procter & Gamble Distributing Company, and all others similarly situated, will be immediately and irreparably harmed.

7. Jurisdiction is conferred on this Court by 28 U.S.C. §§1331, 1332 and 1343.

8. This action arises under the Constitution, laws and treaties of the United States and the matter in controversy herein exceeds the sum or value of $10,000.00 exclusive of interest or costs, insofar as,

for example, the costs of submitting to the unconstitutional audit demands of defendants, both on the part of the individual plaintiffs and the class as a whole, would be more than $10,000.00.

9. Jurisdiction lies as well under 28 U.S.C. §1332 as the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest or costs, as aforesaid, and the controversy is between citizens of different states.

10. Jurisdiction lies as well under 28 U.S.C. §1343(3) without regard to jurisdictional amount to redress the deprivation by defendants, under color of state law, statute, custom or usage, of rights secured to plaintiffs by the Constitution of the United States.

11. Plaintiffs' action for declaratory and injunctive relief is authorized by (a) 28 U.S.C. §§2201 nad 2202 and Rule 57 of the Federal Rules of Civil Procedure which relate to declaratory judgments; (b) 42 U.S.C. §1983 which authorizes equitable relief for the deprivation under color of law of rights secured to all persons within the jurisdiction of the United States by the Constitution and laws of the United States; and (c) 28 U.S.C. §§2281, 2284 providing for injunctive relief against the enforcement, operation or execution of any state statute on the ground of unconstitutionality.

12. This is a proper case for a determination by a three judge court pursuant to 28 U.S.C. §§2281, 2284, since plaintiffs seek an injunction against im-

plementation and enforcement of a compact between the states having applicability in several states, and state-wide applicability within each state so adopting it, on the ground that said compact and the implementing statutes are contrary to the Constitution of the United States.

13. Venue lies in the Southern District of New York by virtue of the residence therein of plaintiffs and of defendant Commission and by virtue of the fact that the claim arises therein as demands for audits have been directed thereto.

14. Service of process upon defendant Corrigan and defendant Commissioners who are not residents of New York is authorized under Federal Rules of Civil Procedure 4(e) and under New York CPLR §§302, 313.

CLASS ACTION ALLEGATIONS

15. Plaintiffs bring this action on their own behalf and on behalf of all other persons similarly situated pursuant to Rule 23(b)(1)(A); 23(b)(1)(B) and 23(b)(2) of the Federal Rules of Civil Procedure.

16. Plaintiffs are members of a class containing, on information and belief, several thousand members consisting of all multistate taxpayers who have been or may be threatened with interstate audits by the Multistate Tax Commission. The class is so numerous that joinder of all members is impracticable. Plaintiffs, who have themselves been subjected to demands to submit such audits, can fairly and adequately

protect the class and are aware of no conflicts of interest among the members of the class. The questions of law and fact raised by plaintiffs' claim are common to and typical of the class, and include the following: (1) whether the Compact is invalid under Article I, Section 10, clause 3 of the United States Constitution; (2) whether the Compact violates Article I, Section 8 of the United States Constitution; (3) whether the Compact violates the Fourteenth Amendment to the United States Constitution; and (4) whether the Compact violates the Fourth Amendment to the United States Constitution.

17. The prosecution of separate actions would create the risk of inconsistent adjudications establishing incompatible standards of conduct for defendants and adjudications with respect to individual members of the class would as a practical matter be dispositive of the interests of the other members or might substantially impair or impede their ability to protect their interests.

18. The defendants threaten to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

STATEMENT OF CLAIM

19. The Multistate Tax Compact, in enactment and in operation, is in violation to the Constitution of the United States, the constitution of numerous state, and of controlling state law on numerous grounds, including:

A.

20. The United States Constitution, Article I, Section 10, clause 3 provides:

> "No State shall, without the consent of Congress, • • • enter into any Agreement or Compact with another State, or with a foreign Power. • • • "

21. The Multistate Tax Compact has not been given the consent of Congress and thus is invalid under Article I, Section 10, clause 3 of the United States Constitution.

B.

22. Interstate taxation and the power over interstate commerce are inextricably intertwined. Under Article I, Section 8 of the United States Constitution, Congress has the exclusive authority "to regulate Commerce with foreign Nations, and among the several States. • • • "

23. Interstate taxation should not be the subject of conflicting legislation by the several states.

24. Congressional interest in regulating interstate taxation and in providing uniform standards therefor has been demonstrated by the introduction, consideration and enactment of several bills.

25. The Multistate Tax Compact encroaches upon this area of exclusive federal supremacy and provides not uniform, but disparate, standards in the area of interstate taxation.

26. In addition, the Multistate Tax Compact discriminates against taxpayers engaged in interstate commerce.

27. By reason of the foregoing, the provisions and implementation of the Multistate Tax Compact violate Article I, Section 8 of the United States Constitution.

C.

28. The Multistate Tax Compact fails to provide adequate standards regarding the qualification of Commission auditors, adequate assurance to multistate taxpayers regarding the confidentiality of audit information and adequate remedies to multistate taxpayers with respect to breach of confidentiality of audit information. The Compact purports to give the Commission broad subpoena powers and authority to seek court orders in connection with the performance of interstate audits.

29. Such standards, assurances and remedies are provided to intrastate taxpayers, such broad powers and authority are not available in connection with the performance of intrastate audits, and discrimination against plaintiffs and other members of the class in these respects is in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

D.

30. The Multistate Tax Compact requires plaintiffs and other members of this class to produce their books and records for audit to Commission auditors unqualified under applicable state laws and to whom confidentiality requirements are inapplicable and unenforceable. In addition, such auditors are agents

of a body whose existence is in violation of the United States Constitution, as aforesaid.

31. Defendants' demands for audit in such circumstances constitute demands for unreasonable searches and seizures in violation of the Fourth Amendment to the United States Constitution.

32. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs respectfully pray on behalf of themselves, and all others similarly situated, that this Court:

1. Assume jurisdiction, and convene a three-judge court under 28 U.S.C. §§2281, 2284 to determine the merits of this controversy;

2. Determine pursuant to Rule 23(c)(1) of the FRCP that this action may be maintained as a class action;

3. Enter a final judgment pursuant to 28 U.S.C. §§2201 and 2202 and Rule 57 of the FRCP declaring that the Multistate Tax Compact is invalid under Article I, Sections 8 and 10 of the United States Constitution, and Amendments Fourth and Fourteenth thereto, under the Constitutions of the several states, and under controlling state law, and declaring that defendant Commission has been established in violation of the United States Constitution; and

4. Enter preliminary and permanent injunctions enjoining the Multistate Tax Commission and the individual defendants, their successors, agents and employees, and all other persons in active concert and participation with them from implementing and

enforcing the provisions of said Multistate Tax Compact, whether through the office of the member states or otherwise, enjoining such Commission from taking any further actions whatsoever, and requiring such Commission to be disbanded.

Dated: New York, New York
January 9, 1973

WHITE & CASE
s/ By Thomas McGanney
A Member of the Firm
Attorneys for Plaintiffs
14 Wall Street
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APPENDIX B

72 Civ. 3438 (CLB)

Defendants' Statement Under Rule 9(g)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES STEEL CORPORATION, *et al.*,

Plaintiffs,

—against—

MULTISTATE TAX COMMISSION, *et al.*,

Defendants.

The following constitutes the material facts as to which the defendants contend there is no genuine issue to be tried.

The Parties

This action was commenced by plaintiffs, United States Steel Corporation, Standard Brands, Incorporated, General Mills, Incorporated, and the Proctor and Gamble Distributing Company, on behalf of themselves and all persons similarly situated (Amended Complaint, p. 1). The following additional corporations are intervenor plaintiffs: Bristol-Myers Co., Eltra Corporation, Goodyear Tire and Rubber Company, Green Giant Company, International Harvester Company, International Paper Company, International Tel. & Tel. Corp., International Business Machines*, Xerox*, McGraw-Hill, Inc., N.L. Industries, Inc., and Union Carbide Corportation (Judge Tenney's decision dated February 5, 1974). The plaintiffs are all engaged in business in

*It is our understanding that International Business Machines and Xerox will withdraw as intervenor parties.

more than one state and thus subject to the provisions of the Multistate Tax Compact pertaining to interstate business and to taxes imposed by more than one state. (Corrigan Affidavit p. 2)

The defendants in this cause are the Multistate Tax Commission and its Executive Director, Eugene F. Corrigan, who administer the "Multistate Tax Compact" entered into by 21 states by appropriate state legislation. (Amended Complaint, pp. 1-3) Other named defendants are the tax administrators of the 21 member states which have adopted the Compact.** (Amended Complaint, pp. 1-3) They include the tax administrator for the states of Alaska, Arkansas, Colorado, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, Texas, Utah, Washington, and Wyoming. These tax administrators are named as commissioners of the Multistate Tax Commission from their respective states. (Amended Complaint, pp. 1-3)

The Controversy

The specific controversy in this cause is whether or not the defendants can administer the interstate (joint) audit provisions of the Multistate Tax Compact (the "Compact") in accordance with its terms absent congressional consent of Congress under Article I, Section 10, Clause 3, of the United States Constitution and without denying the plaintiffs and members of the class various constitutional rights as

**California will be the 22nd regular member as of January 1, 1976. (Corrigan Affidavit, p. 1)

alleged by plaintiffs in their amended complaint (Amended Complaint, pp. 3-4).

More specifically, as contained in their jurisdictional allegations, the plaintiffs allege that under the color of the Compact and of the laws of various of the party states, Defendant Commission, its individual members, and its Executive Director have threatened and continue to threaten action against plaintiffs in violation of their constitutional rights by the demand of the Defendant Commission, its individual members and Defendant Corrigan to have plaintiffs submit to interstate audits to be conducted by the Commission. They further assert that the Compact and the demands by the defendants to turn their books and records over to the Commission auditors for joint audit purposes pursuant to the provisions of the Compact: (i) are invalid under the compact clause Article I, Section 10, Clause 3, of the United States Constitution; (ii) encroach upon the power of Congress to regulate commerce among the several states as provided in the commerce clause, Article I, Section 8, of the United States Constitution; (iii) impose unreasonable burdens on such commerce; (iv) violate the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution; and (v) violate the Fourth Amendment proscription against unreasonable searches and seizures (Amended Complaint, pp. 3-4).

In order to determine the validity of these com-

plaints as set forth more fully in the plaintiffs' Amended Complaint, it is necessary to examine the provisions of the Multistate Tax Compact to see what it does and does not do.

The Multistate Tax Compact

(1) The provisions of the Multistate Tax Compact (the "Compact") as enacted by the 21 member states are substantially in the statutory form enacted by the state of Washington which statute is attached to the affidavit of Eugene Corrigan. (Corrigan Affidavit pp. 1, 7-14)

(2) The Compact went into effect in its party states on August 4, 1967, when seven states had adopted it. (Amended Complaint, p. 2)

(3) As of the present time, the states whose tax administrators have been named as defendants and the state of California effective January 1, 1976, have adopted the Compact (Amended Complaint p. 2; affidavit of Eugene Corrigan, p. 1).

(4) The Compact contains twelve Articles (Corrigan affidavit, pp. 7-14).

(5) Article I sets forth the purposes of the Compact. These are to:

1) Facilitate proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.
2) Promote uniformity or compatibility in significant components of tax systems.
3) Facilitate taxpayer convenience in compli-

ance and filing of tax returns and in other phases of tax administration.

4) Avoid duplicative taxation. (Corrigan Affidavit, p. 7)

(6) Article II contains definitions. (Corrigan Affidavit, pp. 6-7)

(7) Article III contains two sections.

a) Section 1 provides in part that:

"Any taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party state * * * may elect to apportion and allocate his income in the manner provided by the laws of such state * * * without reference to this compact, or may elect to apportion and allocate in accordance with Article IV. This election for any tax year may be made in all party states * * * or in any one or more of the party states * * * without reference to the election made in others." (Amended Complaint, p. 2; affidavit of Eugene Corrigan, p. 8)

b) Section 2 allows another option to interstate taxpayers. It provides that each party state or any subdivision thereof which imposes an income tax shall allow a taxpayer meeting certain requirements to file a "short form" and to compute income tax liability on the basis of a percentage of sales volume within the state.

The Commission has no power to enforce this provision. Section 2 is dependent upon

its operation by the party state legislatures adopting appropriate legislation. (Corrigan Affidavit, p. 8)

(8) Article IV sets forth the optional apportionment and allocation provisions which the interstate taxpayer is given the option to use for both state and political subdivision income tax purposes as permitted by Article III, Section 1. It sets forth the provisions of the Uniform Division of Income Tax Purposes Act promulgated by the National Conference of Commissioners on Uniform State Laws (see Volume 9a, Uniform Laws Annotated, p. 449) and approved by the American Bar Association. This is the most widely used act for the division of income by the income tax states. It is utilized by nearly two-thirds of the states. (Corrigan Affidavit, pp. 5, 8-10) This article grants no power to the Commission.

(9) Article V adopts certain substantive provisions relating to sales and use tax laws. It provides for use tax credits and vendor reliance on sales and use tax exemption certificates. (Amended Complaint, p. 2)

(10) Article VI pertains to the Multistate Tax Commission. Sections 1, 2, and 4 of this Article involve the creation and internal management of the Commission. These provisions are self explanatory and are attached (as well as the other provisions of the Compact) to the affidavit of Eugene Corrigan (Corrigan affidavit, pp. 10-11). Section 1 provides for membership on the Commission, voting rights,

meetings, personnel, offices, adoption of by-laws, reports, acceptance of gifts and disclosures of the same, etc. (Corrigan affidavit, pp. 10-11) Section 2 provides for the executive committee, advisory and technical committees, and such other committees as the Commission may establish in accordance with the by-laws. (Corrigan affidavit, p. 11) Section 4 deals with the finances of the Commission and provides for a budget of estimated expenditures and the amounts to be appropriated by the member states, a method of apportionment of the budget amounts among the member states, accounting, auditing, etc. (Corrigan affidavit, p. 11)

Section 4 deals with the "powers" of the Commission as follows:

"3. In addition to powers conferred elsewhere in this compact, the commission shall have power to:

(a) Study state and local tax systems and particular types of state and local taxes.

(b) Develop and recommend proposals for an increase in uniformity or compatibility of state and local tax laws with a view toward encouraging the simplification and improvement of state and local tax law and administration.

(c) Compile and publish information as in its judgment would assist the party states in implementation of the compact and taxpayers in complying with state and local tax laws.

(d) Do all things necessary and incidental to the administration of its functions pursuant to this compact." (Corrigan affidavit, p. 11)

(11) Article VII deals with the subject matter of uniform regulations and forms as follows:

"1. Whenever any two or more party states, or subdivisions of party states, have uniform or similar provisions of law relating to an income tax, capital stock tax, gross receipts tax, sales or use tax, the commission may adopt uniform regulations for any phase of the administration of such law, including assertion of jurisdiction to tax, or prescribing uniform tax forms. The commission may also act with respect to the provisions of Article IV of this compact.

"2. Prior to the adoption of any regulation, the commission shall:

(a) As provided in its bylaws, hold at least one public hearing on due notice to all affected party states and subdivisions thereof and to all taxpayers and other persons who have made timely request of the commission for advance notice of its regulation-making proceedings.

(b) Afford all affected party states and subdivisions and interested persons an opportunity to submit relevant written data and views, which shall be considered fully by the commission.

"3. The commission shall submit any regulations adopted by it to the appropriate officials of all party states and subdivisions to which they might apply. Each such state and subdivision shall consider any such regulation for adoption in accordance with its own laws and procedures." (Amended Complaint, pp. 2-3; Corrigan affidavit, pp. 11-12)

(12) Article VIII pertains to interstate audits. (Amended Complaint, p. 2; Corrigan Affidavit, p. 12) It reads:

ARTICLE VIII. INTERSTATE AUDITS

"1. This article shall be in force only in those party states that specifically provide therefor by statute.

"2. Any party state or subdivision thereof desiring to make or participate in an audit of any accounts, books, papers, records or other documents may request the commission to perform the audit on its behalf. In responding to the request, the commission shall have access to and may examine, at any reasonable time, such accounts, books, papers, records, and other documents and any relevant property or stock of merchandise. The commission may enter into agreements with party states or their subdivisions for assistance in performance of the audit. The commission shall make charges, to be paid by the state or local government or governments for which it performs the service, for any audits performed by it in order to reimburse itself for the actual costs incurred in making the audit.

"3. The commission may require the attendance of any person within the state where it is conducting an audit or part thereof at a time and place fixed by it within such state for the purpose of giving testimony with respect to any account, book, paper, document, other record, property or stock of merchandise being examined in connection with the audit. If the person is not within the jurisdiction, he may be required to attend for such purpose at any time and

place fixed by the commission within the state of which he is a resident: PROVIDED, That such state has adopted this article.

"4. The commission may apply to any court having power to issue compulsory process for orders in aid of its powers and responsibilities pursuant to this article and any and all such courts shall have jurisdiction to issue such orders. Failure of any person to obey any such order shall be punishable as contempt of the issuing court. If the party or subject matter on account of which the commission seeks an order is within the jurisdiction of the court to which application is made, such application may be to a court in the state or subdivision on behalf of which the audit is being made or a court in the state in which the object of the order being sought is situated. The provisions of this paragraph apply only to courts in a state that has adopted this article.

"5. The commission may decline to perform any audit requested if it finds that its available personnel or other resources are insufficient for the purpose or that, in the terms requested, the audit is impracticable of satisfactory performance. If the commission, on the basis of its experience, has reason to believe that an audit of a particular taxpayer, either at a particular time or on a particular schedule, would be of interest to a number of party states or their subdivisions, it may offer to make the audit or audits, the offer to be contingent on sufficient participation therein as determined by the commission.

"6. Information obtained by an audit pur-

suant to this article shall be confidential and available only for tax purposes to party states, their subdivisions or the United States. Availability of information shall be in accordance with the laws of the states or subdivisions on whose account the commission performs the audit, and only through the appropriate agencies or officers of such states or subdivisions. Nothing in this article shall be construed to require any taxpayer to keep records for any period not otherwise required by law.

"7. Other arrangements made or authorized pursuant to law for cooperative audit by or on behalf of the party states or any of their subdivisions are not superseded or invalidated by this article.

"8. In no event shall the commission make any charge against a taxpayer for an audit.

"9. As used in this article, 'tax,' in addition to the meaning ascribed to it in Article II, means any tax or license fee imposed in whole or in part for revenue purposes."

(13) Article IX is concerned with arbitration of income tax apportionment and allocation disputes between a taxpayer and party states to prevent multiple or double taxation of any taxpayer's income as a result of non-uniform application of the apportionment and allocation rules under Article IV or substantially identical apportionment or allocation rules. This Article is not in effect and can be placed in effect only whenever the Commission finds a need for settling disputes concerning apportionments and allocations and it adopts a regulation putting the

Article into effect. When in effect, it is optional with the taxpayer to submit any dispute to arbitration. (Corrigan affidavit, pp. 5; 12-13)

(14) Article X states the Compact is in force when enacted by seven states and for other states when they enact the same. It specifies how a state may withdraw from the Compact and sets forth the effect of any withdrawal on liability prior to withdrawal and on arbitration proceedings started prior to withdrawal. (Corrigan affidavit, p. 13)

(15) Article XI provides:

"Nothing in this compact shall be construed to:

(a) Affect the power of any state or subdivision thereof to fix rates of taxation, except that a party state shall be obligated to implement Article III 2 of this compact.

(b) Apply to any tax or fixed fee imposed for the registration of a motor vehicle or any tax on motor fuel, other than a sales tax: PROVIDED, That the definition of 'tax' in Article VIII 9 may apply for the purposes of that article and the commission's powers of study and recommendation pursuant to Article VI 3 may apply.

(c) Withdraw or limit the jurisdiction of any state or local court or administrative officer or body with respect to any person, corporation or other entity or subject matter, except to the extent that such jurisdiction is expressly conferred by or pursuant to this compact upon another agency or body.

(d) Supersede or limit the jurisdiction of

any court of the United States." (Corrigan affidavit, p. 13)

(16) Article XII concerns construction and severability and reads:

"This compact shall be liberally construed so as to effectuate the purposes thereof. The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the Constitution of any state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstances shall not be affected thereby. If this Compact shall be held contrary to the Constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining party states and in full force and effect as to the state affected as to all severable matters. [1967 c 125 § 1.]" (Corrigan affidavit, pp. 13-14)

Implementation of the Compact

1. The Multistate Tax Commission (the "Commission") is an entity created by Article VI of the Multistate Tax Compact (the "Compact") entered into by twenty-two states by the enactment of the provisions of said compact by the respective state legislatures, effective as to California on January 1, 1976 (the 22nd member of the Compact). (Corrigan affidavit, p. 1)

2. Attached to the affidavit of Eugene Corrigan

is a copy of the Compact as enacted by the State of Washington which provisions are typical of the Compact provisions enacted by the other 21 member states. (Corrigan affidavit, pp. 1, 7-14)

3. Under the Compact, the Commission consists of one member from each party state who shall be the head of the state agency charged with the administration of the type of taxes to which the Compact applies. (Corrigan affidavit, p. 2)

4. The members of the Commission named as defendants herein are administrators of the states that impose various taxes on plaintiffs and other multistate corporations including income taxes on or measured by net income, gross receipts taxes, capital stock taxes and sales and use taxes. (Corrigan affidavit, p. 2)

5. Neither the Commission nor the members thereof acting in concert have any power to levy taxes, to specify a tax base, to fix tax rates, or to collect taxes from any of the plaintiffs or any other persons whatsoever. (Corrigan affidavit, p. 2)

6. The Compact and the enabling legislation adopted by each member state thereof apply only to multistate businesses subject to taxes in more than one state. They do not apply to any corporation which does business in and pays taxes to only one state. It is this distinction that constitutes the basis of classification of corporate taxpayers under the Compact. (Corrigan affidavit, pp. 2, 7 [Definition of Taxpayer])

7. The plaintiffs are multistate corporations

subject to the taxes imposed by member states in two or more of the member states and are thus subject to the provisions of the Compact pertaining to interstate or multistate corporations. (Corrigan affidavit, p. 2)

8. All the members of the Commission and Compact have enacted Article VIII pertaining to interstate (joint) audits by the Commission. (Corrigan affidavit, p. 2)

9. The conduct of a joint audit by the Commission on behalf of member states or subdivisions thereof is at the sole discretion and option of each member state or subdivision thereof. In the event that a member state or subdivision thereof desires to participate in a joint audit of any multistate taxpayer by the Commission, such member state or subdivision thereof may request the Commission to perform the audit on its behalf and in such case the Commission may conduct such audit in accordance with the provisions of Article VIII of the Compact. (Corrigan affidavit, p. 3)

10. The Commission may refuse the request of a member state or political subdivision thereof to perform a joint audit for the reasons provided in section 5 of Article VIII of the Compact. (Corrigan affidavit, p. 3)

11. Although the Commission may require the attendance of persons within the state where it is conducting an audit or a part thereof or within a member state in which such person resides, at a time

and place fixed by it within such state for the purpose of giving testimony with respect to matters in conjunction with a joint audit, the Commission may not punish such person for failure to attend whether such failure is willful or not. (Corrigan affidavit, p. 3)

12. The Commission, in order to obtain audit information from the taxpayer, may apply to any court having jurisdiction and power to issue compulsory process in any state for which it is conducting a joint audit or any member state in which the object of the order being sought is being situated for an order to obtain the information and failure of any person to obey the order of the court is punishable as a contempt of the issuing court. (Corrigan affidavit, p. 3)

13. Information obtained by any audit of the Commission shall be confidential and available only for tax purposes to party states, their subdivisions, or the United States; and such audit information shall be available only in accordance with the laws of the states or subdivisions on whose account the Commission performs the audit and only through the appropriate agencies or officers of such states or political subdivisions. (Corrigan affidavit, p. 4)

14. The laws with respect to the maintenance of records by multistate taxpayers are the laws of the individual member states and the Commission has no power to direct any multistate taxpayer to keep or maintain any particular records or books. (Corrigan affidavit, p. 4)

15. The Commission may not make any charge against any taxpayer by reason of any joint audit. (Corrigan affidavit, p. 4)

16. Any uniform rules, regulations or forms adopted by the Commission are advisory only to the member states and have no binding effect on any member state or any taxpayer whatsoever. Each member state of the Commission has the right and power to reject *in toto*, disregard, amend, or modify any rules, regulations or forms of the Commission; and the rules and regulations or forms of the Commission have no force and effect in any member state unless adopted by such member state in accordance with that state's own laws and procedures for the adoption of rules and regulations or forms. (Corrigan affidavit, p. 4)

17. Individual member states of the Compact retain exclusive control over any and all legislation or administrative actions affecting (i) the rate of tax; (ii) what is included in any tax base, such as what constitutes taxable income or lawful deductions therefrom for income tax purposes; and (iii) the means and methods of determining any tax liability and of collecting any taxes which may be determined to be due any such member state, whether or not the Commission has conducted a joint audit of any taxpayer on behalf of such member state. (Corrigan affidavit, pp. 4-5)

18. Congress, other than by the enactment of minimal jurisdictional standards under Public Law

86-272 has not enacted any statute which in any way regulates or controls the levying and collection of income taxes, sales taxes, use taxes, capital stock taxes or gross receipts taxes by any state or its political subdivision as pertains to the plaintiffs or corporations similarly situated. (Corrigan affidavit, p. 5)

Dated:

Respectfully submitted,

s/ William D. Dexter

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MULTISTATE TAX COMMISSION, *et al., Appellees.*

On Appeal from the United States District Court for the Southern District of New York

REPLY MEMORANDUM OF APPELLANTS

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REPLY MEMORANDUM OF APPELLANTS

I

As in the court below, the respondents, in their motion to dismiss, seek to create the impression that the Multistate Tax Compact and the Multistate Tax Commission hardly exist and are at most a sort of phantom or wraith resting very lightly on the American fiscal scene. Like the thief found in the chickencoop, who called out "It's just us chickens," they seek to create

the impression that they can be overlooked—that the operations of the Multistate Tax Commission have no impact. To this end, the Commission has cast its rules and practices in the form of "advice" and "recommendations" in order to ward off attack.

Despite this protective phraseology, the Compact has in substance united twenty-one states and created an active regional organization empowered to conduct multistate audits pursuant to its own regulations.[1] This active regional organization—the Multistate Tax Commission—is, in fact, a powerful body, capable of transforming interstate taxation. It is not inconsistent to argue that it is also a body which provides inadequate standards of conduct and insufficient remedies to those it seeks to regulate. The Commission, in the guise of being a purely "advisory" body, denies itself only those powers which could aid multistate businesses desiring to protest its regulations, audits, and assessments.

II

Given the existence and operation of the Compact, and the absence of Congressional consent, appellants do not believe that the validity of this Compact was deter-

[1] These regulations often conflict with the duly adopted laws of the member states. While it may be true, as a technical matter, that these regulations do not formally bind the member states, it is equally true—and more important—that the regulations in fact have substantial force and momentum. The force of the regulations, coupled with the expense of litigation and the demands of the Compact states pursuant to the Commission's regulations and practice, produces great pressure to accept the result of the Commission's multistate audits.

The substantive effect of the Commission's regulations and practice is also demonstrated by the criticism of foreign governments, and has caused some countries to seek protection from the United States Department of the Treasury. (This foreign reaction is discussed in appellants' Jurisdictional Statement at pp. 23-4.)

mined by *New Hampshire* v. *Maine*, decided June 14, 1976. *New Hampshire* v. *Maine* involved a bilateral boundary dispute settled over two centuries earlier and requiring no present legal adjudication. The Multistate Tax Compact involves twenty-one western states [2] and an on-going administrative organization not directly responsive to any electoral body. Such an arrangement is fundamentally distinguishable from the one time, one place agreements involved in boundary cases.[3] The boundary cases are inherently limited in scope; they have not been formally qualified in this Court only because Congressional consent has been sought by many of the modern compacts treating complex issues and involving more than two states. Cf. The Oregon-Washington Columbia River Fish Compact involved in *Idaho, ex rel. Andrus, et al.* v. *Oregon and Washington*, No. 67, Original. No case in this Court has ever upheld the validity of a multistate compact lacking Congressional consent. A number of cases in the lower federal courts and state courts are awaiting this Court's decision in the present case.

[2] The attempt by the Commission to include associate states as part of the Compact is misleading. The Commission at one time resolved that all non-member states would be "associate members," and the Commission's present list of associate members includes states like Arizona, which oppose the Compact and have associated to monitor the operations of the Commission. No associate member participates in the Commission's multistate audit program.

[3] The Chairman of the Commission recognized the distinct nature of the Multistate Tax Compact in an address to the Western States Association of Tax Administrators in October of 1971, stating that, "Its [the Compact's] success is especially surprising when one considers that unlike some compacts . . . this compact is involved in a controversial subject matter, has an administrative body known as the Multistate Tax Commission and is activist in nature." This conference took place October 4-8, 1971, and the Chairman's remarks appear in the record below in Appellants' Affidavit in Opposition to Summary Judgment, p. 9.

III

The Commission asserts that appellant's jurisdictional statement is "replete with misstatements of fact." (Motion to Dismiss, p. 18.) Basically, the Commission contends that neither its rules nor practice call for full apportionment or combined reporting in the conduct of multistate audits. The Commission also suggests that its methods have not been criticized in Congress. Appellants disagree.

The Multistate Tax Commission met in 1969 to draft regulations to implement the Compact. The Fifth Annual Report of the Commission (p. 4) states that "[t]hose regulations had the effect of including in apportionable business income more income, including substantial portions of income from intangibles, . . ." This departure from traditional practice produced some protest, and a hearing was held by the Commission. According to the Fifth Annual Report (p. 4), "[t]he result was that, with minor exceptions, nearly all corporate income was considered to be apportionable, as opposed to allocable."

Appellants' discovery produced several statements by Mr. Corrigan and a proposed Commission resolution which indicated that the Commission recognized that full apportionment required an amendment to the Uniform Division of Income for Tax Purposes Act ("UDITPA"), but that the Commission decided instead to implement the concept through regulations and practice. The language of Commission Regulation IV.1.(a) (reproduced in Appendix A, *infra* p. 1a) reveals that most, if not all, income can be classed as apportionable business income, and appellants' discovery determined that full apportionment was used in numerous Commission multistate audits. In effect, the Commission is arguing only that its regulation still contains the term "non-business income," as well it might, given the Commission's knowledge of the statutory change it was effectuating through regulation. Appellants believe that this argument is specious, given the Commission's full knowledge that its rules and practice have in fact substantially eliminated the distinction between business and non-business income in Compact states.

The Commission further contends that its rules and practice do not call for combined reporting and use of the unitary business concept. Despite regulations which otherwise set up an interstate tax scheme, Commission Regulation IV.2(b)(2) ("Application Article IV: Combined Report") specifically provides that no part of that scheme shall preclude combined reporting. (This regulation is reproduced in Appendix B, *infra* p. 2a.) Appellants do not know whether this regulation was adopted in light of planned Commission audit practices, or whether such practices were fostered by this regulation, but the Commission has conducted numerous multistate audits employing combined reports and the unitary business concept. Frederick Cappetta, the Audit Coordinator for the Commission, stated in the Seventh Annual Report (p. 56) that such audits have been conducted, and stated that the Commission would continue to pursue combined reporting. Mr. Cappetta has also published a combined report and unitary business schedule of information used by the Commission in practice (Appendix C, *infra* p. 3a).

The Seventh Annual Report (p. 50) also includes a statement by Mr. Corrigan declaring the Commission to be the only appropriate body through which widespread use of combined reporting can be achieved. Actions speak louder than words, here as well as elsewhere, and Regulation IV.2(b)(2), the Commission's

unitary business schedule, the Commission's actual conduct in multistate audits, and the statements of Commission personnel should make it clear that the Commission's adherence to combined reporting and the unitary business concept is not "conjectural."

Finally, the Commission's interpretation of congressional action is misleading. For example, the House Reports of 1965 and 1966, cited by the Commission as supporting full apportionment and combined reporting, in no way endorse the methods of the Commission. The full apportionment suggested was based on a two factor formula which eliminated the possibility of taxing "nowhere" income, and otherwise differed substantially from the Commission's methods. Both full apportionment and combined reporting were to be permitted only under the control of the federal government. Specifically, the House Reports recommended that the United States Treasury issue regulations and uniform returns to govern interstate taxation, with the Secretary of the Treasury as the final authority over interstate tax disputes. This sweeping reform was suggested because of the potential for duplicative taxation, burdensome assessment procedures, and other mismanagement inherent in multistate taxation controlled by the states. The Commission's favorable reference to H.R. 11798, 89th Cong., 2d Sess. (1966), the bill incorporating the recommendations of the Reports, is particularly misleading, since it was adverse reaction to this bill which caused the states to convene to form the Multistate Tax Compact.

IV

The essential fact is that the Multistate Tax Compact is a substantial agreement between many states. It is called a Compact. It was intended to be a Compact. Approval of the Compact by Congress was con-

templated and sought. It is hardly fitting to say now that it is not a Compact, when it has failed to obtain Congressional approval.

The Multistate Tax Compact may or may not be beneficient and desirable. That is a question which should be resolved only by Congress. Unless and until Congressional approval is given, this Court should determine that the Compact is without validity under Article I, Sec. 10, Clause 3 of the Constitution.

CONCLUSION

This Court should note probable jurisdiction of the appeal.

Respectfully submitted,

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APPENDIX

Appendix A

MULTISTATE TAX COMMISSION ALLOCATION AND APPORTIONMENT REGULATION IV.1.(a), WHICH APPEARS IN THE SEVENTH ANNUAL REPORT OF THE COMMISSION, pp. 64-5.

Prologue.—These Regulations are intended to set forth rules concerning the application of the apportionment and allocation provisions of Article IV of the Multistate Tax Compact. The apportionment rules set forth in these Regulations are applicable to any taxpayer having business income, regardless of whether or not it has nonbusiness income, and the allocation rules set forth in these Regulations are applicable to any taxpayer having nonbusiness income, regardless of whether or not it has business income.

The only exceptions to these allocation and apportionment rules contained in these Regulations are those set forth in Regulation IV.18 pursuant to the authority of Article IV.18 of the Compact.

These Regulations are not intended to modify existing rules concerning jurisdictional standards.

Reg. IV.1.(a). Business and Nonbusiness Income Defined. Article IV.1.(a) defines "business income" as income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations. In essence, all income which arises from the conduct of trade or business operations of a taxpayer is business income. For purposes of administration of Article IV, the income of the taxpayer is business income unless clearly classifiable as nonbusiness income.

Nonbusiness income means all income other than business income.

The classification of income by the labels occasionally used, such as manufacturing income, compensation for services, sales income, interest, dividends, rents, royalties, gains, operating income, nonoperating income, etc., is of no aid in determining whether income is business or nonbusiness income. Income of any type or class and from any source is business income if it arises from transactions and activity occurring in the regular course of a trade or business. Accordingly, the critical element in determining whether income is "business income" or "nonbusiness income" is the identification of the transactions and activity which are the elements of a particular trade or business. In general all transactions and activities of the taxpayer which are dependent upon or contribute to the operations of the taxpayer's economic enterprise as a whole constitute the taxpayer's trade or business and will be transactions and activity arising in the regular course of, and will constitute integral parts of, a trade or business. (See Regulation IV.1.(c) for more specific examples of the classification of income as business or nonbusiness income; see Regulations IV.1.(b) and IV.2.(b)(2) for further explanation of what constitutes a trade or business.)

Appendix B

MULTISTATE TAX COMMISSION ALLOCATION AND APPORTIONMENT REGULATION IV.2.(b)(a), WHICH APPEARS IN THE SEVENTH ANNUAL REPORT OF THE COMMISSION, p. 69.

Reg. IV.2.(b)(2). Application of Article IV: Combined Report. If a particular trade or business is carried on by a taxpayer and one or more affiliated corporations, nothing in Article IV or in these regulations shall preclude the use of a "combined report" whereby the entire business income of such trade or business is apportioned in accordance with Article IV.9. to IV.17.

Appendix C

UNITARY BUSINESS INFORMATION SCHEDULE, WHICH APPEARS IN THE SEVENTH ANNUAL REPORT OF THE MULTISTATE TAX COMMISSION, p. 57.

We will ask for a schedule of affiliates plus the following information as to each entity:

(a) Date Acquired
(b) Date Merged, Dissolved or Sold
(c) Percent of Ownership or Control
(d) State of Incorporation and Date of Incorporation
(e) Names of Officers and Directors by Corporation and Year
(f) Nature and Description of Principal Business Activity
(g) Location of Operations
(h) Manner in which Products are Marketed
(i) Location of Accounting Records

We are going to ask for a description of the connection which existed during the audit period between the parent and the subsidiaries and among the affiliated subsidiaries themselves. The description furnished should include:

A. The extent to which operations are unitary as evidenced by centralized (in each relationship indicate the "from" corporation and the "to" corporation):

(1) Management;
(2) Operational Supervision;
(3) Accounting;
(4) Purchasing;
(5) Advertising;
(6) Insurance;
(7) Financing;

(8) Physical Facilities;
(9) Research and Development Activities;
(10) Preparation and Payment of Taxes;
(11) Legal Services;
(12) Sales Force;
(13) Public Relations;
(14) Employee Benefits;
(15) Budget Preparation; and
(16) Equipment Leasing.

B. The extent of unitary use of:

(1) Centralized Executive Force
  (a) Board of Directors
  (b) Officers;
(2) Interaffiliate Transfer of Personnel (Disclose Job Descriptions and Job Titles);
(3) Master Contracts for Common Customers;
(4) Tradenames and Trademarks;
(5) Common Patents; and
(6) Government Contract Negotiators.

C. An explanation of any product similarities.

D. The amounts of total sales or business done and the amounts of sales to and from affiliated corporations, by year and products involved.

E. The extent to which any of the aforementioned unitary features are evidenced by service charges or royalty and license or other payments, showing the year and the amounts from and to the respective corporations.

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The appellants[1] file this appeal to review the judgment of the United States District Court for the

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[1] The plaintiffs below were United States Steel Corporation, Standard Brands Incorporated, General Mills, Inc., and The Procter & Gamble Distributing Company. On February 5, 1974, the court below permitted Bristol Myers Co., Eltra Corporation, Goodyear Tire and Rubber Company, Green Giant Company, International Business Machines Corporation, International Harvester Company, International Paper Company, International Telephone and Telegraph Corporation, McGraw-Hill, Inc., NL Industries, Inc., Union Carbide Corporation, and Xerox Corporation to intervene as plaintiffs. The court below ordered that the suit proceed

Southern District of New York entered July 14, 1976, granting appellees[2] summary judgment and upholding the constitutionality of the Multistate Tax Compact.

OPINION BELOW

The opinion of the District Court is reported in 417 F. Supp. 795 (S.D.N.Y. 1976).[3] An earlier opinion on

as a class action. International Business Machines and Xerox later withdrew as intervenor plaintiffs before decision to avoid having Judge Brieant recuse himself at a pre-trial hearing as he held stock in both corporations.

The original plaintiffs and the remaining intervenors are the appellants here.

[2] Appellees named as defendants in the case below are the Multistate Tax Commission, Eugene P. Corrigan, Executive Director of the Multistate Tax Commission, and Eric E. Wohlforth (Alaska), Richard Heath (Arkansas), John H. Heckers (Colorado), J. Ed. Straughn (Florida), Ralph W. Kondo (Hawaii), Ewing H. Little (Idaho), Jas. O. Mathis (Indiana), James T. McDonald (Kansas), Allison Green (Michigan), James Schaffner (Missouri), J. Morley Cooper (Montana), Wm. E. Peters (Nebraska), John J. Sheenan (Nevada), Fred L. O'Cheskey (New Mexico), Byron L. Dorgan (North Dakota), Charles H. Mack (Oregon), Robert F. Calvert (Texas), Vernon L. Holman (Utah), George Kinnear (Washington), and E. S. MacClean (Wyoming), all Commissioners of the Multistate Tax Commission from their respective states. George E. Mahin, Tax Commissioner of the State of Illinois, was named as a defendant at the start of the suit, but Illinois withdrew from the Multistate Tax Compact and the Multistate Tax Commision on August 29, 1975, and Mahin was not listed as a defendant in the lower court's caption of the case. Florida also withdrew from the Compact, effective October 1, 1976. Wyoming withdrew February 22, 1977. Since the suit was started, California and South Dakota have become members of the Multistate Tax Compact and Commission. Alabama has adopted the Compact subject to the consent of Congress.

[3] This opinion is reproduced as Appendix A (pp. 1a-21a) in the separately bound Appendix to the Jurisdictional Statement.

motion to dismiss is reported at 367 F. Supp. 107 (S.D.N.Y. 1973).[4]

JURISDICTION

The Judgment of the District Court was entered July 14, 1976.[5] Notice of Appeal was filed on September 7, 1976,[6] and the Jurisdictional Statement was filed on November 4, 1976. Probable jurisdiction was noted on February 22, 1977.

The jurisdiction of this Court rests on 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether the Multistate Tax Compact, as enacted and applied, is invalid because it has failed to obtain the consent of Congress, in violation of Article I, Section 10 of the Constitution of the United States.

2. Whether the Multistate Tax Compact, as enacted and applied, is invalid because it burdens interstate commerce, in violation of Article I, Section 8 of the Constitution of the United States.

3. Whether the Multistate Tax Compact, as enacted and applied, is invalid because it fails to provide adequate notice, standards of conduct, and remedies to those which it seeks to regulate, in violation of Section 1 of the Fourteenth Amendment.

[4] This opinion is reproduced as Appendix B (pp. 22a-47a) in the separately bound Appendix to the Jurisdictional Statement.

[5] The Judgment is reproduced as Appendix C (pp. 48a-50a) in the separately bound Appendix to the Jurisdictional Statement.

[6] The Notice of Appeal is reproduced as Appendix D (pp. 51a-53a) in the separately bound Appendix to the Jurisdictional Statement.

4. Whether the District Court erred in deciding the case for the appellee upon a motion for summary judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 10 of Article I of the Constitution of the United States provides, in part:

> "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . ."

Section 8 of Article I of the Constitution of the United States provides, in part:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . ."

Section 1 of the Fourteenth Amendment of the Constitution of the United States provides, in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Multistate Tax Compact is reproduced as Appendix E (pp. 54a-79a) in the separately bound Appendix to the Jurisdictional Statement.[7]

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[7] The version reproduced is the model version. The state code citations are as follows: Alaska, Alas.Stat. § 43.10.010; Arkansas, Ark.Stat. 1947, § 84-4101; Colorado, Colo.Rev.Stat. 1973, Art. 24-60-301; Florida, Fla.Stat.Ann. § 213.15, repealed Fla. Sessions Law 76-149; Hawaii, Hawaii Rev.Stat. § 255-1; Idaho, Idaho Code § 63-3701; Indiana, Burns' Ind.-Stat.Ann. § 6-8-9-101; Kansas, Kan.Stat.Ann. § 79-4301; Michigan, Mich. Comp.Laws Ann. § 205.-581; Missouri, Mo.Rev.Stat., 1969, § 32.200; Montana, Mont.Rev. Code 1947, § 84-6701; Nebraska, Neb.Rev.Stat. 1943, § 77-2901; Nevada, Nev.Rev.Stat. § 376.010; New Mexico, N.M.Stat.Ann. 1953 § 72-15A-37, 44; North Dakota, N.D.Cent.Code, § 57-59-01; Oregon, Or.Rev.Stat. § 305.655; Texas Civil Stat., Art. 7359a; Utah, Utah Code Ann. 1953, § 59-22-1; Washington, Wash.Rev.Code Ann., § 82.56; Wyoming, Wyo.Stat. 1957, § 39-376. California adopted the Compact effective January 1, 1976. Deering Calif. Code Ann. (Rev. & Tax), § 38001. South Dakota became a member July 1, 1976. S.D.Comp. Laws 10-54. Wyoming withdrew from the Compact on February 22, 1977.

STATEMENT

The Multistate Tax Compact was drafted in 1966, and became effective by its own terms on August 4, 1967, when the seventh state adopted it. Twenty states have now joined in the Compact by statutory enactment.

The history of the period immediately preceding the drafting and adoption of the Compact is significant. In 1959, this Court decided *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, and immediately thereafter Congress enacted a statute which, in Title I, provided certain rules for the taxation of income from interstate commerce.[8] The statute also included a Title II, which provided that "full and complete studies" should be made under the auspices of Congress "for the purpose of recommending to Congress proposed legislation providing uniform standards to be observed by the states in imposing income taxes on income" derived from interstate commerce.[9]

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[8] Act of September 14, 1959, P.L. 86-272, 73 Stat. 555.

[9] *Ibid.*, 73 Stat. at 556.

This report was rendered in 1964 and 1965, and it recommended that Congress should seek a solution to interstate tax problems.[10] It was shortly thereafter that the Multistate Tax Compact was drafted at the instance of several state tax administrators, and put into effect.

Article VI of the Compact creates the Multistate Tax Commission, an independent body designed to implement and administer the Compact. The Commission is composed of one member from each of the participating states, who together appoint an Executive Director as chief administrator of the Compact. Serving under the Executive Director are auditors and other officials who carry out the business of the Commission. The Commission's headquarters are in Boulder, Colorado, a location convenient to its largely western state membership, and the Commission's General Counsel maintains offices in Olympia, Washington. The Commission also has audit offices in Chicago and New York City.

The Multistate Tax Compact grants the Commission various powers. For example, the Commission can issue regulations, adopt practices, and prescribe uniform forms for the taxation of interstate business. The Commission has adopted a number of regulations and practices pursuant to this power, including those calling for combined reporting, and the apportionment of the non-business income of multistate taxpayers.[11]

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[10] Report of Special Subcommittee on State Taxation of Interstate Commerce, H. Rep. No. 1480, 88th Congress, 2d Sess., Vol. II, (1964) p. 559. *See also* H. Rep. No. 1480, 88th Cong., 2d Sess., Vol. I (1964); H. Rep. No. 565, 89th Cong., 1st Sess., Vol. 3 (1965); H. Rep. No. 952, 89th Cong., 1st Sess., Vol. 4 (1965).

[11] The power to issue regulations is contained in Article VII of the Compact. The rules and practices adopted by the Commission are discussed below.

The Commission is also empowered to conduct multistate audits. These multistate audits are effectuated by the broad subpoena authority possessed by the Commission.[12] The Commission has performed numerous such audits, in as many as eleven states at one time, involving large sums of money and taxpayers conducting interstate and international businesses. These audits have often been conducted pursuant to the Commission's combined reporting and full apportionment rules.

The Multistate Tax Compact has not received the consent of Congress, although numerous bills have been introduced seeking such consent.[13] The appellants are all interstate and international business corporations, and multistate taxpayers, who have been subjected to demands by the Multistate Tax Commission to submit to audits conducted by the Commission. Appellants have refused such demands, in all cases offering to submit to lawful audits conducted by the states involved. The appellants have also offered to waive the applicable statutes of limitations while they pursued this action.

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[12] The power to conduct multistate audits and the power to issue subpoenas is contained in Article VIII of the Compact.

[13] *See* S. 3892, 89th Cong., 2d Sess. (1966); S. 883, 90th Cong., 1st Sess. (1967); S. 1551, 90th Cong., 1st Sess. (1967); H.R. 9476, 90th Cong., 1st Sess. (1967); H.R. 13682, 90th Cong., 1st Sess. (1967); S. 1198, 91st Cong., 1st Sess. (1969); H.R. 6246, 91st Cong., 1st Sess. (1969); H.R. 9873, 91st Cong., 1st Sess. (1969); S. 1883, 92d Cong., 1st Sess. (1971); H.R. 6160, 92d Cong., 1st Sess. (1971); S. 3333, 92d Cong., 2d Sess. (1972); S. 2092, 93d Cong., 1st Sess. (1973). The member states and the Commission have lobbied vigorously for such consent. *See* the Annual Reports of the Multistate Tax Commission, 1968-1976.

Proceedings Below

This action was commenced by the filing of a complaint in August, 1972. An amended complaint was filed on January 10, 1973, seeking both a declaratory judgment that the Multistate Tax Compact, as then adopted by twenty-one states, was invalid under the United States Constitution, and a permanent injunction barring its operation and enforcement. (App. 2-10.)

Before answering the complaint, appellees moved to dismiss the action on the ground that appellants had failed to state a claim upon which relief could be granted. (App. 11-12.) Judge Tenney dismissed this argument as "frivolous," stating that the case would have to be decided on the merits. 367 F. Supp. 107 (S.D.N.Y. 1973).[14]

Appellees answered the complaint in September 1973 (App. 14-18), and appellants filed a set of interrogatories in October.

By a memorandum order dated February 5, 1974, Judge Tenney granted a motion by various multistate corporations to intervene as plaintiffs, and ordered the suit to proceed as a class action with appellants and intervenor-plaintiffs as class representatives.[15]

In June, 1975, appellees moved for summary judgment and requested that the motion be heard by a three-judge court. (App. 20-42.) Appellants opposed the motion, arguing that substantial questions of fact

[14] This opinion is reproduced as Appendix B (pp. 22a-47a) in the separately bound Appendix to the Jurisdictional Statement.

[15] This order is reproduced as Appendix F (pp. 80a-89a) in the separately bound Appendix to the Jurisdictional Statement.

needed to be resolved before it could be said that the enactment, operation, and enforcement of the Multistate Tax Compact did not affect the national interest, or the interests of states not members of the Compact, so as to require the consent of Congress. Additional facts also had to be developed to determine the degree and nature of the effect the Compact had on interstate commerce and rights guaranteed by the Fourth and Fourteenth Amendments. (App. 43-68.)

In the alternative, appellants asked for summary judgment in their favor. They contended that under a proper construction of the Constitution, the Multistate Tax Compact was unconstitutional because it lacked the consent of Congress. Appellants also argued that the Compact encroached upon the commerce power of Congress.

The district court granted summary judgment in favor of appellees on July 14, 1976.[16] In holding that the Multistate Tax Compact does not require the consent of Congress, the court relied primarily on *Virginia* v. *Tennessee,* 148 U.S. 503 (1893), and *New Hampshire* v. *Maine,* 426 U.S. 363 (1976). The court held that the Compact does not increase the political power of the member states or interfere with the national interest.

The court also held that the Compact does not encroach upon the federal commerce power or unreasonably interfere with such commerce. The Court stated that interstate taxation is not a matter of peculiar federal concern: "There is nothing inherent in the problems of multistate tax administration that would re-

[16] The opinion of the three-judge court is reproduced as Appendix A (pp. 1a-21a) in the separately bound Appendix to the Jurisdictional Statement.

quire federal regulation, nor has Congress yet identified these problems as a matter of peculiar federal concern." 417 F. Supp. at 802. (App. A to Juris. Statement, p. 13a.)

The decision also rejected the various arguments appellants had made under the Fourth and Fourteenth Amendments.

The opinion noted that related cases in other federal courts and various state courts were awaiting disposition of this action. Many cases are still awaiting the action of this Court.

Notice of appeal was filed September 7, 1976, and probable jurisdiction was noted February 22, 1977.

SUMMARY OF ARGUMENT

I

Article I, Section 10 of the Constitution forbids any state from entering into an "Agreement or Compact" with any other state "without the Consent of Congress." Despite this explicit constitutional proscription, the Multistate Tax Compact has been placed in operation without congressional consent, although such consent has been sought repeatedly.

Few compacts were formed prior to 1921, and those that were involved primarily one-time, one-place boundary settlements between two states. Since 1921, however, when Congress consented to the Colorado River Compact and New York Port Authority Agreement, the compact has been increasingly used as a constitutional means of resolving interstate problems. These post-1921, "modern" compacts, uniting many states, treating complex issues, and often creating multistate

commissions, are fundamentally different from boundary agreements.

Congress has recognized and exercised its constitutional duty during this increase in the number of complex compacts, examining and consenting to 125 of 139 compacts as of 1966. Moreover, congressional scrutiny in this field has often been particularly rigorous. Such congressional scrutiny gives Congress the opportunity to review, and in many cases monitor on an ongoing basis, the effects of the compact involved.

The Multistate Tax Compact is similar to the many modern compacts which have sought and obtained congressional approval. It unites 20 primarily western states, treats the complex problem of multistate and multinational taxation, and creates the Multistate Tax Commission, a regional administrative body empowered to promulgate tax regulations and conduct multistate audits. The Multistate Tax Compact, however, differs from other compacts in one significant way. Despite the unambiguous language of the Constitution and the clear evidence of congressional activity in this field, the Compact is operating without the consent of Congress. Thus, the Compact is constrained by none of the safeguards Congress has used repeatedly to protect our federal system from the harm that may be produced by regional actions. The court below refused to upset the Compact's self-proclaimed validity until actual harm was shown.

Since almost all compacts have sought and obtained congressional consent, few cases questioning the validity of a compact lacking congressional consent have reached this Court. No case has ever upheld the validity of a compact involving many states and an inde-

pendent commission, to which Congress has not consented. Several cases involving bilateral boundary disputes, however, have noted in dicta that congressional consent is not needed unless the interests of the Nation or non-member states are affected. Although the court below relied on these cases, they should not control a modern, complex compact. The potential impact of such a compact, unlike the impact of a one-time, one-place boundary agreement, is not readily determinable. No group of states, therefore, acting pursuant to the dicta of the boundary cases, should be able to decide for itself that a multistate confederation is valid, or that such a confederation presents no potential threat to the Nation or non-member states. This is particularly true where the compact is intended to transform interstate taxation through continuous regional actions and the efforts of an administrative commission.

II

Even if this Court decides that a compact may be put in operation without congressional approval when the party states decide that the compact will not affect federal interests or other states, the Multistate Tax Compact should be declared invalid until congressional approval is obtained. The Multistate Tax Compact has already interfered with the Nation's conduct of foreign affairs and its interest in efficient interstate commerce. For example, the Multistate Tax Commission has adopted regulations and practices which subject income earned in foreign nations to taxation in the Compact states even if such income is not considered taxable under federal principles. The Commission's rules are contrary to international practice, United States treaty commitments, and federal principles, and

have provoked complaints from many of our treaty partners. A recent treaty concluded with the United Kingdom provides for relief from the Commission's rules, and recent legislative proposals would ban the use of such rules in the international field. The Commission has indicated, however, that it will oppose the treaty and other federal action limiting its power.

III

The Multistate Tax Commission also has adopted rules altering the method of taxing dividends, interest, and other non-business income traditionally employed in interstate commerce, thus affecting the interests of non-Compact states. Such income is usually allocated to, and thus taxable in, only the state of commercial domicile. In many cases, this means that such income is taxable in eastern, non-Compact states. The Commission, however, may apportion, or "share," such income with the Compact states. This practice may produce a revenue loss in the non-member states, or result in multiple taxation of corporations domiciled in the non-member states. Corporations may migrate from the east coast to avoid this latter result, and the non-Compact states may be forced to form a compact of their own. This and other issues, including loss of sovereignty to the Commission, have caused many states to oppose the Compact, and at least three states to repudiate their membership.

IV

The Multistate Tax Compact also burdens interstate commerce and violates the guarantees of the Fourteenth Amendment. The Compact and Commission produce confusion, inefficiency, inconsistent tax deter-

minations, and multiple taxation. Standards for compliance are unclear, and remedies inadequate. Moreover, the powers inherent in the Compact and the rules of the Commission have been used abusively during the pendency of this case. Subpoena campaigns have been conducted and arbitrary tax assessments issued, pursuant to a Commission plan intended to force appellants in this case to "capitulate." Such actions should not be allowed to continue until the Compact has been subjected to congressional scrutiny, and unless the affirmative approval of Congress is obtained.

ARGUMENT

I. THE SCOPE AND OPERATION OF THE COMPACT CLAUSE

A. Congress Has Actively Reviewed and Approved Compacts Among The States, As Required By The Constitution.

The constitutional question presented in this case is whether a compact which unites most of the western states and creates an independent, regional administrative body designed to affect the apportionment, allocation, audit, and compliance procedures applicable in the taxation of multistate and multinational corporations is valid in the absence of congressional consent. The requirement of consent is explicit in the Constitution. Article I, Section 10 provides that "No State shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State." Congress has recognized its constitutional responsibility under Article I, Section 10, and has examined almost every compact formed since the creation of this Nation.

During the first 120 years following the adoption of the Constitution, 26 compacts between the states were

put into operation with the consent of Congress.[17] Twenty-five of these compacts involved boundary matters, and 24 involved only two states. None of these compacts created a permanent interstate administrative agency. Compacts at this time were regarded as a means of adjustment or settlement of specific situations or controversies and were not looked on as instruments for the continuous exercise of power or development of policy.

In 1921, the Colorado River Compact and the Port of New York Authority Agreement were approved by Congress.[18] These compacts were radically different from those that had gone before. Both were intended to address a variety of problems, changing over time, and neither consisted of a one-time, one-place boundary agreement. The Colorado River Compact involved the water problems of an entire region, and was eventually joined by eight states. The Port of New York Authority Agreement created a joint planning and administrative agency designed to define problems and seek solutions on an interstate basis.

After the consent of Congress was given to these two compacts, agreements among the states increased dramatically. The first national compact, the Interstate Compact for the Supervision of Parolees and Proba-

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[17] *See* Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L. J. 685, 735 (1925). Frankfurter & Landis list seven additional compacts approved in advance by Congress before 1920, but which were not concluded by the states involved.

[18] Colorado River Compact of 1921, 42 Stat. 171 (1921); Port of New York Authority Agreement, 42 Stat. 174 (1921), 42 Stat. 822 (1922).

tioners, was approved by Congress in 1934.[19] The Interstate Compact to Conserve Oil and Gas, which was the first compact formally establishing a commission to recommend state regulations and uniform state practices in an economic context, was approved by Congress in 1935.[20] Interstate regulatory machinery was proposed in the Tri-State Compact and Ohio Valley Sanitation Compact, consented to by Congress in 1935 and 1940 respectively.[21] All in all, 65 compacts were concluded between 1921 and 1955, more than double the number which were created in the first 120 years following the adoption of the Constitution.[22]

This sudden rise in the number of compacts was the result of the increasing complexity and interrelationship of the social, economic, and political problems facing the states and the Nation. While not necessarily amenable to federal resolution nor subject to the doctrine of federal preemption, such problems were not always confined to a single state. As a result, the compact was increasingly resorted to as the constitutional device permitting an interstate or regional approach to these problems. In our federal system, the Constitution allows such interstate or regional action as long as the states do not unilaterally combine or agree, but in-

[19] This compact is identified as the first national compact by The Council of State Governments, INTERSTATE COMPACTS 1783-1966, p. vii. The compact was consented to in the Federal Crime Control Act of 1934, 48 Stat. 909 (1934).

[20] 49 Stat. 939 (1935).

[21] Tri-State Compact (also known as the Interstate Sanitation Compact), 49 Stat. 932 (1935); Ohio Valley Sanitation Compact, 54 Stat. 752 (1940).

[22] Barton, INTERSTATE COMPACTS IN THE POLITICAL PROCESS (1967).

stead subject their plans to the review and approval of Congress.

By 1966, 139 compacts were in operation, and 125 of these had sought and obtained the consent of Congress.[23] These modern compacts produced at least 62 advisory or regulatory commissions, functioning on a multistate basis. These multistate commissions deal with pollution, oil conservation, nuclear energy, water allocation, urban development, transportation, taxation, and other complex issues fundamentally distinguishable from boundary agreements. Of the compacts which include multistate commissions, all but five have received congressional approval.

[23] This information was obtained from The Council of State Governments, INTERSTATE COMPACTS 1783-1966. This source actually lists 144 compacts, but some were formed before the adoption of the Constitution and one was listed under two different names and counted twice. Since the publication of this source, at least one of the compacts described as lacking congressional consent has obtained such consent. *See* Great Lakes Basin Compact, consented to at 82 Stat. 414 (1968).

A chronological compilation of compacts approved since 1789, including congressional approval of amendments, new members, and renewals, is included as Supplement A to this brief at pp. 53-70. This is followed by the alphabetical compilation of the Council of State Governments in Supplement B, at pp. 71-120. There is some duplication in the two listings, but each presents information which may be useful to the Court.

The compacts other than the Great Lakes Basin Compact which were operating in 1966 without the consent of Congress are listed in Supplement C to this brief at p. 121. Some of the compacts operating without the consent of Congress resemble reciprocal legislation, and at least two involve only two states. Most of the compacts do not create independent multistate commissions, and most appear to have less potential impact than the Multistate Tax Compact. Nevertheless, the validity of the compacts must be questioned in view of their subject matter and in the absence of congressional consent.

Since 1966, 16 more compacts have received the consent of Congress, and at least 10 of these involve multistate commissions. Moreover, as of 1970, 13 additional compacts specifically acknowledged that the consent of Congress was required and were awaiting such consent to become effective.[24] The modern compact has been the subject of congressional scrutiny because the real and potential effects of continuous, concerted multistate activity are substantially different from those produced by the single, dispositive decision involved in a boundary settlement. Thus, during the rise in the use of modern compacts, even those compacts which appeared entirely innocuous have, with very few exceptions, undergone congressional examination.[25]

In considering the many modern compacts brought before it, Congress has not taken its constitutional duty lightly. For example, before consenting to the Compact on Taxation of Motor Fuels Consumed by Interstate Buses and the Bus Taxation Proration and Reciprocity Agreement, Congress consulted the Commerce Department, Justice Department, Interior Department, State Department, Treasury Department, and District of Columbia, and further consent was required before additional states could join.[26] Congres-

[24] *See* The Council of State Governments, INTERSTATE COMPACTS 1783-1970.

[25] *See, e.g.*, the Kansas City Waterworks Compact, which provided for mutual relief from taxation on the water facilities in Kansas City, Kansas, and Kansas City, Missouri, and which was approved by Congress at the beginning of the rise in the number of compacts, 42 Stat. 1058 (1922), and the Cumbres and Toltec Scenic Railroad Compact, which permitted two states to pool finances to preserve an antique railroad and which was approved by Congress in 88 Stat. 1421 (1974).

[26] *See* H. Rep. No. 102, 89th Cong., 1st Sess. (1965); S. Rep.

sional consultation with various federal agencies is commonplace when compacts are brought before Congress. These consultations may produce objections to the compact or reveal real or potential interferences with the national interest or the rights of non-member states not considered by the members of the proposed compact. This may lead to prolonged debate, or cause Congress to withhold its consent. In fact, in at least two instances consent bills have been vetoed by the President.[27] This activity shows that the impact and approval of a multistate compact present complex questions, best answered in the political arena, and that the Congress and President have accepted and carried out the role prescribed for them by Article I, Section 10.

Congressional scrutiny has been particularly vigorous where multistate commissions are involved, even though almost all such commissions are organized as "advisory" bodies, with final authority in the states.[28]

No. 76, 89th Cong., 1st Sess. (1965). The consent of Congress appears at 79 Stat. 58 (1965).

[27] The Republican River Compact was vetoed April 2, 1942, H.R. Document No. 69, 77th Cong., 2d Sess. (1942). A compact concerning fishing in the Atlantic Ocean was vetoed August 11, 1939. *See* Zimmermann & Wendell, THE INTERSTATE COMPACT SINCE 1925 (1951), p. 38.

[28] For example, 20 of 29 multistate commissions were found to be "advisory" as of 1959 by Leach & Sugg, THE ADMINISTRATION OF INTERSTATE COMPACTS (1959). The court below relied heavily on the "advisory" structure of the Multistate Tax Commission, but the need for congressional consent is not negated by the fact that some of the tasks undertaken by a compact and multistate commission are matters that individual states could undertake alone. The Constitution has balanced the conflicting demands of state sovereignty and federalism by permitting the states to act individually without the advance approval of Congress. Where the states proceed by "Agreement or Compact," however, and

Although deemed "advisory," multistate commissions have offices, personnel, and budgets, and are formed to shape and implement interstate policy. Through regulations, bylaws, practices, coordination, and persuasion, multistate commissions effectuate change on a regional or interstate basis. Many such commissions are started to prevent federal action, mitigating pressures for federal intervention—even where federal intervention might be better for the non-member states and the Nation—and increasing the power and efficacy of the member states.

Mindful that multistate commissions are created to foster interstate change and that the full significance of concerted activity may not be initially apparent, Congress frequently places additional conditions on the consent given to compacts creating multistate commissions. For example, the consent given to the Interstate Compact to Conserve Oil and Gas must be renewed every four years.[29] This compact is much like the Multistate Tax Compact, in that its member states are "free" to adopt any part of the multistate agreement. In addition, the Oil Commission created by this compact is purely "advisory," conducting "studies"

intend to influence interstate events through continuing collective action and the efforts of an independent body, the consent of Congress is required. A multistate compact is inevitably an arrangement with power, presenting a greater potential threat to those states not party to the confederation, and to federal supremacy. Almost every compact containing a multistate commission, whether "advisory" or not, has sought and obtained the consent of Congress.

[29] The last renewal came at 90 Stat. 2365 (1976). The consent given the Atlantic States Marine Fisheries Compact, 56 Stat. 267 (1942), was also limited in duration to not more than 15 years. In 1950, Congress consented to an amendment to this compact and repealed the time limitation. 64 Stat. 467 (1950).

and issuing "recommendations" on the amount of oil that should be produced by the member states. Since 1935, however, such "advice" usually has been taken, and Congress has reviewed the antitrust, energy, and other implications of this compact every four years. In 1955, fully twenty years after the initial approval of this compact, Congress added a further condition to its consent, requiring the Attorney General of the United States to report annually on the activities of the Oil Commission, so that Congress might have current information on its effects.[30]

Congress has also required that annual reports be submitted by the multistate commissions themselves.[31] In addition, federal representation on multistate commissions has often been a condition of consent.[32] Congress has also rewritten compacts to conform to its conception of the national interest, and demanded that the amended version be accepted as a condition of consent.[33]

Where neither continuing information nor representation on a commission is required, Congress may limit its consent to the terms of the compact originally ap-

[30] *See* Joint Res. of July 28, 1955, sec. 2, 69 Stat. 385, 391 (1955).

[31] For example, annual reports are required from the Atlantic States Marine Fisheries Compact, 56 Stat. 267 (1942), the Pacific Marine Fisheries Compact, 61 Stat. 419 (1947), and the Wabash Valley Compact, 73 Stat. 694 (1959).

[32] The commissions on which federal representation is required include the Potomac Valley Conservancy Compact, 54 Stat. 748 (1940), Rio Grande Interstate Compact, 53 Stat. 785 (1939), Upper Colorado River Basin Compact, 63 Stat. 31 (1949), and the Wabash Valley Compact, 73 Stat. 694 (1959).

[33] This happened, for example, in the case of the Gulf States Marine Fisheries Compact, 63 Stat. 70 (1949).

Mr. Justice Field, of course, could not foresee the rise of the modern compact, and such compacts should not fall within the narrow scope of his statement in *Virginia* v. *Tennessee*. No group of states should be able to decide for itself that a multistate confederation is valid, nor should any group of states be able to decide that the interests of the other states or the Nation will not be harmed by a modern compact. This is particularly true where the objective of the compact is to transform interstate taxation through continuous, collective action and the efforts of an independent, on-going administrative body.

The decision of the court below was also reached by ignoring the potential impact of the Compact on the interests of the non-member states and the Nation. The court below believed that the self-proclaimed validity of the Compact should not be overturned until actual harm to the interests of the non-member states or the Nation was shown. This analysis is contrary to Justice Field's own statement in *Wharton* v. *Wise,* that compacts which "might" affect such interests need congressional approval. This analysis is also contrary to the importance placed on potential effects by Congress in reviewing and approving over 100 compacts. As discussed above, Congress consults with a wide-range of federal agencies and other sources of information to make certain a compact will not produce unforeseen harm, often requiring annual reports, periodic renewals of consent, and additional approval of new members or amendments.

The difficulty experienced by the court below in dealing with the potential effects of the Compact, and the contrasting means available to Congress to ascertain and weigh such effects, shows that the impact and

validity of a modern, multistate compact should be decided through the political process in Congress. Mr. Justice Frankfurter stated, in *West Virginia ex rel. Dyer* v. *Sims,* 341 U.S. 22, 27(1950), after considering a case involving a modern, multistate compact, that all compacts require congressional consent and that judicial determination of the impact of a compact would not be appropriate. The Multistate Tax Commission has already resorted to the political process to forestall federal legislation circumscribing, or perhaps even banning, its activities, and the Compact itself has been brought before Congress for approval, although no such approval was obtained. Apparently, the member states and the Commission were unwilling to negotiate and make possible changes sufficient to obtain congressional consent, as did the states of the Great Lakes Basin Compact, deciding instead to proceed without approval. This unilateral decision is contrary to Article I, Section 10. The Multi-state Tax Compact should not become valid until through the political process already invoked by the member states and Commission, the consent of Congress is obtained.

II. THE EFFECT OF THE COMPACT ON THE NATIONAL INTEREST

A. The Multistate Tax Compact Interferes With The Conduct Of Foreign Affairs.

If this Court should decide that the dictum of Mr. Justice Field is the controlling test under the Compact Clause, and that congressional consent is required only if a compact interferes with the interests of other states or the federal government, the Multistate Tax Compact should still be declared invalid unless and

proved. Thereafter, any new members or amendments to the compact require additional congressional consent to be valid. For example, the Bi-State Development Agency Compact, to which Congress consented,[34] provided that Congress should have the power to review rules and regulations adopted by the Bi-State Agency. Congress utilized these powers in 1959, when it reviewed and approved additional powers sought by the member states.[35] At that time Congress also reserved to itself the right to require the disclosure of information or data by the Bi-State Development Agency.

Congress need not, of course, amend or redraft a compact to which it objects, and can instead simply decline to consent. For example, the Great Lakes Basin Compact was drafted to promote the orderly development, use, and conservation of the resources of the Great Lakes Basin. Despite this seemingly constructive statement of purpose, Congress rejected the compact as first proposed.

The commission created by the Great Lakes Basin Compact planned to become involved in the resolution of water diversion problems on the Great Lakes, and to work closely with Canada on this and other matters. Objections were lodged by the State Department, Treasury Department, Interior Department, and Federal Power Commission. The Great Lakes Basin Compact was then amended to meet these objections, stripping the compact and its commission of almost all powers. Authority over water diversion and the ability to work formally with Canada were eliminated. Essentially, the compact and commission which were brought back to Congress for approval were empowered only to report on behalf of the member states and issue recommendations.

[34] 64 Stat. 568, 570 (1950).

[35] 73 Stat. 582 (1959).

The Congressional Committee which then considered the revised Compact wondered whether such an advisory compact required consent to be valid, and requested an opinion from the Attorney General. The Attorney General gave his opinion that consent was necessary. In discussing the "advisory" role of this Compact, the Attorney General noted the Compact's statement of purpose and the formality of the agreement among the Great Lake states, and stated: "While the powers of the Commission appear to be primarily to collect and report on data and to make recommendations which the members agree merely to 'consider,' the formulation of such important recommendations is itself an important function which may significantly influence the legislative function of the member states and thus shape the future development of the Great Lakes Basin."[36]

B. The Multistate Tax Compact, A Modern, Multistate Compact Creating An Independent Commission And Treating A Complex Problem, Requires The Consent Of Congress To Be Valid.

The Multistate Tax Compact has not received the consent of Congress, although such consent has been repeatedly sought.[37] The Compact was formed, in part,

[36] Hearings on H.R. 937, 89th Cong., 2d Sess. (1966), pp. 10-13. The opinion of the Attorney General is discussed in Ridgeway, INTERSTATE COMPACTS (1971) at p. 161. The Great Lakes Basin Compact was consented to at 82 Stat. 414 (1968).

[37] *See* note 13 above, p. 7.

to promote interstate tax uniformity and facilitate the determination of the state and local tax liability of multistate taxpayers, a general statement of purpose similar to that considered by Congress and the Attorney General in reviewing the Great Lakes Basin Compact. The Compact was drafted during 1966 following this Court's decision in *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450 (1959), and as an aftermath of deliberations in Congress on interstate taxation leading to the enactment of the Act of September 14, 1959, P.L. 86-272, 73 Stat. 555 and the 1964 House Committee Report recommending congressional resolution of interstate tax problems.[38] Officials of the Compact have indicated that the Compact was created to forestall additional federal legislation on interstate taxation.[39] The twenty members of the Compact are primarily western states, and no eastern industrial state is now a member. The Compact is organized much like the Interstate Compact to Conserve Oil and Gas, with the member states "free" to adopt or reject specific provisions of the Compact. For example, the power to conduct multistate audits is applicable only in those states which have specifically adopted it. The multistate audit provisions, however, have been adopted by all the member states of the Compact.

[38] *See* note 10 above, p. 6.

[39] Mr. Corrigan, the Executive Director of the Multistate Tax Commission, has stated that one of the purposes of the Compact is "simply killing congressional action in this field." See Corrigan's statements in *Taxation of Interstate Business,* PROCEEDINGS OF TAX FOUNDATION SEMINAR (April 16-17, 1970), p. 17. *See also* First Annual Report of the Multistate Tax Commission (1968), p. 1. A tax policy research study conducted by the Department of the Treasury has also recognized that the Compact was formed to counteract federal legislation in this field. *See* ESSAYS IN INTERNATIONAL TAXATION (1976), p. 202.

As discussed above, the Compact creates the Multistate Tax Commission, a regional administrative body empowered to issue regulations and adopt practices to implement the interstate tax policies of the Compact. The Commission has adopted a number of regulations and practices pursuant to this power. These include:

(1) *Combined reporting.* Regulations and practices of the Commission call for use of the unitary business concept, which requires combined reporting on a multistate and multinational basis. Under this method of taxation, the income of a multicorporate business operation, earned in many states and countries, is "combined" as the income of a "unitary business" and subject to taxation in those Compact states in which one of the corporations of the multicorporate operation is present. Taxes are then imposed on the overall multistate and multinational income of the operation without regard to whether the income being taxed was earned by a taxpayer subject to the jurisdiction of the Compact state, and despite the fact that the relation between the corporations often falls short of affiliation under federal law.[40] Bills banning these regulations and practices

[40] The Ninth Annual Report of the Multistate Tax Commission (1976) describes the combined reporting and unitary business practices of the Commission thus (p. 3): "The utilization of this concept requires the use of an accounting approach called combination. This approach involves treating a unitary business as one entity whether it is operated as one corporation with many divisions or as a group of corporations. The determination of the income tax liability of any one of these corporations to a State is then made on the basis of the activities of the entire business." *See also* the explanation of the Audit Coordinator of the Commission, Frederick Cappetta, at Cappetta, *Joint Audit Program of the Multistate Tax Commission,* 33 INST. ON FED. TAX. (N.Y.U.) 961 (1975); the articles endorsing this method of taxation published in the Multistate Tax Commission Seventh Annual Report (1974); and the frequent discussion of combined reporting and full apportionment in other Annual Reports.

This Court first dealt with this method of taxation in *Butler*

member states of the compact, and not the federal government, it is understandable that foreign governments view these taxes as imposed in, and thus by, the United States, in a manner inconsistent with international tax principles and the treaty commitments of the United States.[51]

The United Kingdom demanded and obtained protection from these practices in its latest tax treaty negotiations with the United States.[52] The treaty was sent to the Senate for its advice and consent by President Ford on June 24, 1976, accompanied by the Report of the Department of State. In this Report, the State Department stated that the practices of some of our states had produced protests from many foreign governments and that the new provision was designed to meet such objections.[53] The Treasury Department

[51] A tax policy research study conducted by the Treasury Department stated that the worldwide application of the unitary business concept may indeed be inconsistent with basic United States treaty obligations. ESSAYS IN INTERNATIONAL TAXATION (1976), p. 264.

[52] The Ninth Annual Report of the Multistate Tax Commission (1976) reported on this development (p. 9):

> "The Treasury Department has included in the pending tax treaty with the United Kingdom provisions which would substantially shackle the States in their efforts to improve their tax administration capabilities. The objectionable provisions of the proposed United Kingdom Treaty would prohibit the use of combination at the international level in instances wherein the parents are located in the United Kingdom. Similar provisions are being incorporated into treaties which are currently being negotiated with other nations. This is especially unfortunate in view of the need to use international combination not only at the State level but at the Federal level as well."

[53] The Report stated:

> "This provision represents the first attempt to bind State and Local taxing authorities by a substantive provision of the

has also stated that the provision was intended to "harmonize" the tax practices of the national and state governments, by limiting the income taxable in a state to the income taxable under federal principles.[54]

> treaty (other than non-discrimination). Under the basic rules of our other tax conventions a Contracting State entering into such tax conventions is prohibited from taking into account, in determining the tax liability of an enterprise doing business in that Contracting State, the income, expenses, etc. of related enterprises of the other Contracting State, or in other countries if those enterprises are not engaged in business in the Contracting State, except to the extent that intercompany transactions are not conducted on an arm's length basis. This treaty, for the first time, extends this limitation to State and local tax authorities with respect to enterprises controlled by United Kingdom residents. This limitation is directed at the practice of a few States which are attempting to take into account the income on a consolidated basis of all related foreign enterprises in assessing the State income tax of a single member of the related group doing business in the State. This method of assessment, which includes the burden of producing worldwide records of all of the affiliated companies, has raised many objections by our treaty partners and we are now seeking to deal specifically with this problem in our treaties." CCH Tax Treaties ¶ 8103EE.

[54] *See* the TECHNICAL EXPLANATION OF THE UNITED STATES AND UNITED KINGDOM INCOME TAX TREATY, March 9, 1977. *See also* the remarks of Robert J. Patrick, International Tax Counsel for the Treasury Department, before the International Fiscal Association, New York, January 7, 1976, at p. 7:

> "We attach particular importance to the treaty provision which meets the request of the British Government to deal with excessive tax burdens imposed at the State level. In addition to the usual treaty provisions prohibiting discrimination against nationals and corporations of our treaty partners, which bind State and local authorities as well as the federal government, the treaty contemplates that State taxing jurisdictions are limited to the same inter-company allocation rules as the federal government when examining the accounts of a United Kingdom controlled company doing business in a State. . . . The income of such entity and any related United Kingdom controlled foreign company may be measured and adjusted only on the basis of arm's length principles and not on that of a consolidated income approach combining the income of separately incorporated companies."

have been introduced in Congress.[41]

(2) *Non-business income.* Traditionally, non-business income, such as rents, interest, and dividends on investments, is allocated to the site of commercial domicile.[42] But the Commission has adopted rules and practices calling for full apportionment

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Bros. v. *McColgan,* 315 U.S. 501 (1942). The Court declined to analyze both the apportionment formula involved and the potential for multiple taxation, and instead upheld the tax by requiring a multistate corporation attacking a state taxation system to prove by clear and cogent evidence that the tax results in multiple taxation.

The regulations and practices of the Commission are further discussed below.

[41] *See, e.g.,* S. 317, 92d Cong., 1st Sess. (1971); S. 1245, 93rd Cong., 1st Sess. (1973); S. 2080, 94th Cong., 1st Sess. (1975). The Annual Reports of the Multistate Tax Commission reveal that the Commission has vigorously opposed passage of any federal act that could resolve the difficult problems inherent in interstate taxation.

[42] This means that, under traditional interstate practice, passive, non-business income is subject to taxation only in the state of domicile. Such income, not earned by the business operations of the taxpayer, is not subject to taxes, through apportionment, in other states.

The Uniform Division for Income Tax Purposes Act ("UDITPA"), 7 Uniform Laws Annotated 365 (1970), a model statute adopted by many Compact and non-Compact states, specifically preserves the distinction between business and non-business income. For cases illustrating the operation of this traditional practice, *see, e.g., Avco Corp.* v. *Wasson,* 230 S.E.2d 614 (S.C. 1976); *American Bakeries Co.* v. *Johnson,* 259 N.C. 419, 131 S.E.2d 1 (1963); *Cargill, Inc.* v. *Spaeth,* 215 Minn. 540, 10 N.W.2d 728 (1943); *California Baking Corp.* v. *State Tax Commission,* 97 Utah 367, 93 P.2d 463 (1939). A tax policy research study published by the Treasury Department also indicates that allocation of non-business income is the long-standing method of taxation employed by the states. *See* ESSAYS IN INTERNATIONAL TAXATION (1976), p. 201.

of the non-business income of multistate and multinational taxpayers.[43] Moreover, the "full apportionment" rules of the Commission conflict in many cases with the laws of the Compact states. This is particularly true with respect to the Uniform Division of Income for Tax Purposes Act ("UDITPA"), which has been adopted in many of the compact states.[44]

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[43] The Executive Director of the Commission explained this in the Commission's Seventh Annual Report (1974): "Full apportionment involves applying the [taxing] formula to all income regardless of source or nature" (p. 47).

[44] See note 42 at p. 26 above and note 68 at p. 48 below.

Ferdinand Schoettle, a law professor at the University of Minnesota, discussed this in *The U. K. Treaty and the State Taxation of Corporate Income,* TAX NOTES, April 4, 1977, p. 3: "Since any amendment to the substantive provisions of the Multistate Tax Compact requires legislative action by all of the member states, the MTC has attempted to solve these substantive problems by promulgating regulations which bend, if not amend, the statute" (p. 7). Mr. Schoettle states that, for example, the Commission believes the distinction between business and non-business income should be eliminated, "but has chosen, instead of recommending amendment of the Compact, to restrict non-business income by regulation" (p. 7).

James H. Peters, state and local taxation editor of the JOURNAL OF TAXATION has also discussed the conflict between the "full apportionment" rules of the Commission and the laws of many of the Compact states:

> "I believe that the full apportionment concept in the regulations is an effort to change the Compact law to what Commission members consider to be a preferable approach to allocation and apportionment, rather than a sound interpretation of the Uniform Act. As such, it represents a legislative effort rather than an administrative effort. In my opinion, what we have seen here is a politicalization of the administrative function. I have the impression that representatives of member States tend to view the Commission much as a

(3) *Multistate Audits.* Finally, the Commission is the body authorized by the Compact to conduct multistate tax audits, and it has adopted rules and policies governing the conduct of such audits.

As is the case with most congressionally approved compacts which create multistate commissions, the Multistate Tax Compact deems its Commission to be "advisory." To develop and implement such "advice," however, the Commission is funded by the member states; it has hired auditors, attorneys, and other staff; and it has offices in New York, Chicago, Boulder, and Olympia. The "advice" of the Commission is frequently taken. For example, the Commission's regulations have been adopted by the tax administrators in eleven states, and the multistate audit provisions have been approved by all of the allied states. During appellants' limited discovery, it was determined that the combined reporting and full apportionment rules of the Commission have been applied in dozens of multistate and multinational audits, involving large sums of

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legislative body (at first somewhat like a Senate but recently, with the help of California, more like a House of Representatives) and the Compact much like a constitution; that is a document setting forth broad general principles under which the Commission has almost unlimited freedom to act. Not only is this an incorrect view of the Compact, I for one, believe that there is great danger in it. Administrators are part of the executive branch of State government, and with one notable exception, are not answerable to an electorate. They do not have responsibility for State fiscal policies and should not be engaged in legislative efforts. [Footnote omitted] In addition, treating the Compact as a broad delegation of legislative power raises a serious issue with respect to intergovernmental relationships and has a very definite bearing on the need for Congressional consent."

The comments of Mr. Peters are included in the Affidavit of Mr. McGanney, App. pp. 47, 58.

money and as many as eleven states at one time. The Annual Reports of the Commission also reveal that numerous such audits have been conducted. These audits have been conducted on behalf of states which have not formally approved the Commission's rules.[45]

The "advisory" status of the Commission is belied not only by its actual operation, but by the independence granted it by the member states. For example, the Commission may refuse to perform audits requested by a state or states which are members of the Compact, or the Commission may offer to conduct audits based on its own determination that the proceedings would be of interest to the member states. The Commission may also issue subpoenas to require the attendance of witnesses to give testimony and produce records and documents, and may use the compulsory

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[45] The adoption of rules or practices which conflict with the laws of the member states appears to be a recurrent custom of the Commission. In addition to the changes made in UDITPA and the conduct of audits in states which have not approved its practices, the Commission has altered the Compact itself without the approval of the legislatures of the member states, by changing the voting rights and powers of the member states. The Compact provides (Article VI) that each state shall have one vote on the Commission, and that a majority of members shall determine the actions of the Commission. The Commission, however, has adopted a rule that all member states shall vote both on a one-state, one-vote basis and also by vote weighted according to population. This method of voting was adopted by the Commission at the urging of California, effectively giving California veto power over the activities of the Commission. This independent action by the Commission, in violation of the terms of the Compact as adopted by the legislatures of the member states, is one of the reasons Indiana is taking steps to withdraw from the Compact. This alteration in the voting methods called for by the Compact is discussed in Appellants' Rule 9(g) Statement, App. pp. 43, 46, and the Affidavit of Thomas McGanney, App. pp. 47, 56.

process of any member state of the Compact to enforce compliance with its subpoenas. Failure to comply with such process is punishable as contempt of the issuing court. The Commission has issued its own subpoenas, and has also brought suit in its own name.[46] Such enforcement powers are extremely rare among the compacts approved by Congress, and are the source of frequent abuse and great potential harm.[47]

The Multistate Tax Compact is typical of a number of compacts created since 1920. It joins together almost half the states of the Nation to consider complex problems on a continuous and collective basis. It has produced an independent administrative commission, with more staff and greater powers than many of the commissions subjected to congressional review. Although typical of modern compacts, it is different in one major respect. Unlike almost every other modern compact the Compact and Commission have operated since 1967, adopting rules and practices, conducting multistate and multinational audits, and adding (and losing) members—all without the consent of Congress.

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[46] These subpoenas and cases are discussed in the Eighth Annual Report of the Commission (1975) at p. 4. The suits brought by the Commission include *Multistate Tax Commission, et al.* v. *International Harvester Company, et al.*, Case No. 58802, District Court for the Fourth Judicial District of Idaho; *Multistate Tax Commission, et al.* v. *International Business Machines, et al.*, Case No. 55395, Superior Court of the State of Washington, County of Thurston; *Multistate Tax Commission* v. *Sperry Rand Corp.*, Case No. 56154, District Court for the Fourth Judicial District of Idaho.

[47] Leach & Sugg, THE ADMINISTRATION OF INTERSTATE COMPACTS (1959) could find only two commissions as of 1959 with similar enforcement powers (p. 184). The misuse of these powers, and resulting harassment, are discussed below.

Thus, there was no federal participation in the negotiation of the Compact, nor are there federal representatives on the Multistate Tax Commission to monitor its rules and practices, particularly with respect to their effect, through taxation of foreign businesses, on international relations. These rules and practices have not been approved by Congress, as was required in the Bi-State Development Agency Compact. Annual reports are not submitted by the Commission to Congress, nor does a federal official recurrently review the impact of the Compact. The existence of the Compact has not been limited to a term of years, as was the Interstate Compact to Conserve Oil and Gas and the Atlantic States Marine Fisheries Compact, so that Congress could periodically determine the full significance of continuous multistate activity. The concentration of power within the Nation represented by the increase in membership, which has risen from seven in 1967 to twenty today, has not been subjected to congressional scrutiny. Finally, the Compact has not been placed before the many federal agencies which could reveal real or potential interferences with the non-member states or the Nation.

In fact, the Multistate Tax Compact and its Commission have simply placed themselves in operation on their own authority, constrained by none of the safeguards relied upon by Congress in reviewing numerous other modern compacts. The Compact has put itself into effect, and set about to transform interstate taxation. The court below accepted the validity of this self-proclaimed assumption of power despite the unambiguous language of the Constitution and the clear evidence of congressional concern in this field. The decision of the court below is contrary to the function

assigned to Congress by the Constitution and to the active role recognized by Congress in monitoring the development of the modern compact. The decision of the court below would essentially eliminate the role of the Compact Clause in protecting our federal system.

C. No Case Has Ever Upheld The Validity Of A Modern, Multistate Compact Lacking Congressional Consent.

Since almost all compacts have sought and obtained the consent of Congress, few cases questioning the validity of a compact lacking congressional consent have reached this Court. *See, e.g., Holmes* v. *Jenison,* 14 Peters 540 (1840); *Virginia* v. *Tennessee,* 148 U.S. 503 (1893); *Wharton* v. *Wise,* 153 U.S. 155 (1894); *North Carolina* v. *Tennessee,* 235 U.S. 1 (1914); *Virginia* v. *West Virginia,* 246 U.S. 565 (1918); *New Hampshire* v. *Maine,* 426 U.S. 363 (1976). These cases all involve one-time, one-place, bilateral boundary agreements, and have virtually no application to a wide-ranging multistate agreement such as that involved in this case. This Court has never upheld the validity of a modern compact, uniting many states and creating an independent administrative commission, to which Congress has not given its consent.

The most frequently cited of the cases which have considered compacts, and the one relied on below, is the opinion of Mr. Justice Field in *Virginia* v. *Tennessee.* In that case, the Court held that Congress had consented to the boundary settlement between Virginia and Tennessee that was the subject matter of the suit. Justice Field then went on to explain, in what was clearly a dictum, his understanding of the Compact Clause. He said (148 U.S. at 517-518):

> "The terms 'agreement' or 'compact' taken by themselves are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects; to those to which the United States can have no possible objection or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control."

This dictum was repeated in *North Carolina* v. *Tennessee, supra,* and *Virginia* v. *West Virginia, supra,* again in language not essential to the holdings. These cases, like *Virginia* v. *Tennessee,* both involved disputes arising from bilateral boundary settlements. At the close of the last Term, this Court cited Justice Field's explanation in yet another bilateral boundary case, after holding that the fundamental boundary dispute before the Court had been settled over two centuries earlier, and that no present legal adjudication was required. *New Hampshire* v. *Maine,* 426 U.S. 363 (1976).

Justice Field himself recognized the narrow scope of his statement in *Virginia* v. *Tennessee.* Writing one year later in *Wharton* v. *Wise, supra,* he stated that no compact was valid without the consent of Congress if it "might affect subjects placed under the control of Congress, such as commerce . . ." 153 U.S. at 171 (1894). In relying upon *Virginia* v. *Tennessee,* the District Court ignored this nearly contemporaneous explanation by Justice Field of the scope of the Compact Clause.

until it receives the consent of Congress. A compact uniting twenty states and intended to transform multistate and multinational taxation cannot escape affecting the non-party states and the national interest. For example, the Compact has already interfered in the conduct of foreign affairs. Before appellants' discovery was terminated by the action of the court below, it was learned that the Commission had conducted multinational audits, combining worldwide income and apportioning it to the member states of the Compact. The Treasury Department has noted that, unlike other methods of multinational taxation, this method subjects to state taxation the undistributed income of a foreign subsidiary, the income of a foreign parent, and the income of foreign brother-sister corporations, regardless of whether such income is subject to taxation under principles employed by the United States.[48]

"Combined reporting" and the "unitary business concept" may present a superficial appeal, but this will not survive scrutiny in a concrete case. Consider, for example, a parent holding company incorporated in Great Britain, with a subsidiary incorporated and doing business in Nigeria, and another subsidiary incorporated and doing business in California. Because of fire or storm, or business reverses, the subsidiary in California has a loss. The subsidiary in Nigeria, however, is highly profitable, its earnings in fact exceeding the loss in California. Under "combined reporting" or the "unitary business concept," the entity has net earnings, and a portion of this is apportioned to California, despite the fact that demonstrably no income was derived in California.

[48] *See* ESSAYS IN INTERNATIONAL TAXATION (1976), p. 258.

The illustration also serves to show the potentiality for administrative pressure and harassment. Through pressure on the subsidiary and its employees in California, the entity is required, through subpoena, to produce its books and records from Nigeria and Great Britain, despite the fact that California has no jurisdiction over these corporations. Moreover, the entity is required to demonstrate the accuracy of its reports of income and deductions in these countries, although the rules for determining income there, and methods of accounting, may be different from those demanded in California or by the Multistate Tax Commission.

It is a basic tax treaty position of the United States and other developed countries that an enterprise should be taxable only in a country in which it carries on a business through a permanent establishment. This principle is enunciated in the so-called "arms length" standard of Article 7 of the Model Income Tax Treaty of the Organization for Economic Cooperation and Development, and is included in all tax treaties of the United States.[49] The Multistate Tax Commission has criticized this "arms length" standard, however, and under its rules income of a foreign entity will be taken into account and apportioned to a taxing state in the United States even though such entity has no permanent establishment in the United States under federal principles.[50] Although these taxes are imposed by the

[49] This principle is also reflected in Articles 7 and 9 of the United States Model Income Tax Treaty, which the Department of the Treasury announced on May 18, 1976. *See* 41 Fed. Reg. 20427 (1976). The text of the Model Treaty appears in CCH Tax Treaties ¶ 9767.

[50] *See* the Ninth Annual Report of the Multistate Tax Commission (1976), p. 3.

The Commission has written that it "has taken the lead in stirring opposition to the objectionable provisions of the proposed treaties" and that "[t]he reason for Federal support of the restrictive provisions is difficult to comprehend."[55] Despite this opposition, the Task Force on Foreign Source Income of the House Committee on Ways and Means, after discussing the Multistate Tax Compact and the unitary business concept, recently recommended that the problems created by worldwide combination be resolved by Congress. Specifically, the Task Force recommended that "the States be precluded from taking into account, under the unitary method or any other method, the income of foreign affiliates of corporations doing business within the states until such time as that income is subject to Federal income tax."[56] Thus, the political process has already been invoked, and Congress or the Senate is involved in the international problems created by the Compact. The Compact should not be allowed, therefore, to continue to create international problems, or to influence the legislative resolutions of such problems, until Congress has consulted the State Department, Treasury Department, and other agencies to determine if the Compact is in the national interest, and has then acted affirmatively to give consent to the Compact.

The multinational tax regulations and practices of the Commission also interfere with the free movement

[55] The Ninth Annual Report of the Multistate Tax Commission (1976), p. 3.

[56] RECOMMENDATIONS OF THE TASK FORCE ON FOREIGN SOURCE INCOME, 95th Cong., 1st Sess. (1977), pp. 25-30. Several bills limiting or banning the methods of the Commission in the international area have also been considered by Congress. *See* the bills cited at note 41 above, p. 26.

of goods, capital, and ideas across national boundaries that has been an objective of United States foreign policy in recent decades. Contact with the member states of the Compact sufficient to satisfy the unitary business concept will result in the imposition of a tax, whether or not such contact justifies a tax under federal or treaty principles. Overlapping international claims to portions of the same tax base will lead to multiple taxation.[57] This double or multiple taxation can be avoided, of course, if the foreign government recognizes the legitimacy of the income reallocation imposed by the Commission, and allows the taxpayer correlatively to reduce its income or its local tax liability in the foreign country. It is doubtful, however, that a foreign government will so defer to the Multistate Tax Commission. The foreign government may question the apportionment methods unilaterally chosen by some states of the United States.

Finally, the methods of the Commission burden the development of an international economy by imposing costly administrative and compliance requirements. For example, a foreign parent would not ordinarily keep the books of its operations outside of the United States in terms of United States dollars, or in a manner which would conform to United States accounting principles. Moreover, the Commission "recommends" taxation of worldwide income without regard to re-

[57] For example, according to authorities in California, the worldwide application of the unitary business concept produces an additional $125 million in tax revenue in California alone that could not be obtained under traditional international practices. This estimated revenue effect is reported in ESSAYS IN INTERNATIONAL TAXATION (1976), p. 265 and the TASK FORCE REPORT ON FOREIGN SOURCE INCOME, 95th Cong., 1st Sess. (1977), p. 29.

strictions on currency repatriation and exchange revaluations. Such practices on the part of the Commission should not be allowed to continue until Congress has reviewed and consented to them.

B. The Multistate Tax Compact Has A Serious Impact On Interstate Commerce.

The Multistate Tax Compact also interferes with the national interest in promoting low cost, efficient interstate business. The objections of foreign governments in the multinational context to the multiple taxation fostered by the unitary business methods of the Commission are equally valid in the multistate context. Determining what constitutes a "unitary business," for example, is extremely difficult. No objective standards exist, and the very broad definition advanced by the Commission creates a serious potential for misallocation. The more attenuated the interdependence between the taxpayer and the income and assets of the rest of the group, the greater the risk of improperly allocating to a certain state or country income earned in another.

Multiple taxation may also result from the apportionment of non-business income utilized by the Commission in numerous audits. With many states still following the concept of allocating this income to the place of commercial domicile, and the Commission apportioning some of the same income to the western states, it is inevitable that many interstate businesses will be taxed on more than 100% of their non-business income.

Finally, the Nation's interest in efficient interstate business is harmed by the cost of complying with

the regulations and practices of the Commission. A taxpayer must file data concerning not only its own operation, but also data concerning sales, payrolls, and properties of legally separate corporations, including those organized and operated in foreign countries. The cost to the taxpayer of obtaining and processing the data of a large multistate or multinational organization in order to determine the taxable income of one small part of the organization may be excessive, particularly when different accounting systems are used in other states or abroad. The Commission's multistate audits are conducted in the first place under (1) the laws of the member states, *or* (2) the Commission's regulations and practices, whether or not adopted by the member states, *or* (3) the laws of the member states and the Commission's regulations and practices. It is not surprising that multistate businesses question the accuracy and fairness of such audits.[58]

The national interest in inexpensive, efficient interstate commerce has been acknowledged by congressional committees, which have recognized both the cost of letting the states control interstate taxation and the need for national uniformity.[59] Several states have

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[58] This brief has confined itself largely to discussion of the multistate and multinational system of *income* taxation being established by the Commission. The Commission, however, has also adopted practices and uniform forms designed to implement a regional system regarding *sales, use,* and *other taxes.* Thus, the multiple taxation and compliance costs discussed in connection with income taxes are also involved in many other state revenue raising procedures.

[59] *See, e.g.,* H. Rep. No. 1480, 88th Cong., 2d Sess., Vols. 1 and 2 (1964); H. Rep. No. 565, 89th Cong., 1st Sess., Vol 3 (1965); H. Rep. No. 952, 89th Cong., 1st Sess., Vol. 4 (1965); and HEARINGS BEFORE THE SUBCOMMITTEE ON FINANCE, 93d Cong., 1st

also called for federal legislation insuring a level of national uniformity and reducing the risk of multiple taxation;[60] and Congress has enacted further legislation affecting interstate taxation, in the field of banking.[61] The Multistate Tax Compact, however, was created, for the purpose of "killing off" (see p. 24, *supra*) any action that might produce a federal resolution to the difficult problems inherent in interstate taxation. The Compact and Commission should not be allowed to continue operations while simultaneously influencing the legislative process and disclaiming the need for congressional scrutiny.

Sess. (1973). *See also* the following bills: H.R. 11798, 89th Cong., 2d Sess. (1966); H.R. 16491, 89th Cong., 2d Sess. (1966); S. 317, 92d Cong., 1st Sess. (1971); H.R. 1538, 92d Cong., 1st Sess. (1971); H.R. 977, 93d Cong., 1st Sess. (1973); S. 1245, 93d Cong., 1st Sess. (1973); H.R. 9, 94th Cong., 1st Sess. (1975); S. 2080, 94th Cong., 1st Sess. (1975).

[60] *See, e.g.*, the statement of the Chairman of the New York State Department of Taxation and Finance, the statement of the Assistant Attorney General of Florida, and the statement of the Chairman of the Arizona State Tax Commission in HEARING BEFORE THE SUBCOMMITTEE ON STATE TAXATION OF INTERSTATE COMMERCE OF THE SENATE COMMITTEE ON FINANCE, 93d Cong., 1st Sess. (1973), at 133, 367, 393.

[61] *See* Act of August 16, 1973, P.L. 93-100, 87 Stat. 342. In Section 7 of this Act, Congress prohibited state taxation of interstate bank and other depository transactions "until such time as uniform and equitable methods are developed for determining jurisdiction to tax and for dividing the tax base among States," in order to further "the national goals of fostering an efficient banking system and the free flow of commerce among the States . . ." Congress directed that a study of proper allocation and apportionment, and of other multistate taxation questions related to financial institutions, be conducted.

III. THE EFFECT OF THE COMPACT ON THE NON-MEMBER STATES

A. The Multistate Tax Compact Interferes With The Sovereignty And Revenue Policies Of The Non-Member States.

The "unitary business" and "combined reporting" practices of the Compact and Commission may produce multiple taxation and excessive compliance costs. As recently as 1972, these methods were used in only two states, but this number has increased to 16 in the last four years.[62] If these practices continue to spread throughout the western United States, unfairness in interstate taxation can be avoided only through the efforts of some coordinating body. In the Commission's Seventh Annual Report, the Commission's Executive Director stated that the Commission was the only such "coordinating" body capable of solving the problems of interstate taxation; he rejected the possibility of a federal solution or of leaving the field to the states without the problem-causing methods espoused by the Commission.[63] The non-Compact states are thus being pressured to join the Compact, or perhaps to form their own compact, while the Commission continues both to establish methods in the western states which produce interstate taxation problems, and to oppose federal solutions to those problems. Interstate business is unfairly taxed in the interim while the non-member states exercise their sovereign right to resist the pressures of the Commission.

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[62] Ninth Annual Report of the Multistate Tax Commission, (1976), p. 3.

[63] Seventh Annual Report of the Multistate Tax Commission, (1974), p. 50. *See also* Corrigan, *Interstate Corporate Income Taxation—Recent Revolutions and a Modern Response*, 29 VAND. L. REV. 423 (1976), at 441-2.

The regulations and practices of the Commission calling for apportionment of non-business income also harm the non-member states. As has been discussed, such income is traditionally allocated to the site of commercial domicile. The Commission, however, apportions such revenue to the states of the Compact, either increasing the tax burden on interstate businesses through multiple taxation of the same income, or depriving eastern, commercial centers of revenue to which they have a legitimate, or at least a traditional claim. If such commercial centers do not generally tax the non-business income allocated to them under traditional systems because they desire to attract business, the Multistate Tax Commission deprives them of this tax incentive.[64]

The Commission's economic actions, taken on a regional basis, could force interstate businesses to migrate from the states adhering to traditional interstate practices.[65] This possibility and the other interferences with the sovereignty and revenue policies of the states have caused widespread opposition to the Compact. Since the Compact was formed, 27 states have resisted confederation, and three states have repudi-

[64] The Commission is particularly opposed to such tax incentives, calling the non-business income allocated under the traditional system to states which choose not to tax it "nowhere income." The Commission apportions such income so that it will be taxed in the Compact states. *See* Corrigan note 63 above, at pp. 429-436.

[65] The Executive Director of the Multistate Tax Commission has indicated that an important consideration in the development of the traditional methods of interstate taxation was "that the tax system not drive away corporate businesses to other parts of the nation." *See* the Seventh Annual Report of the Multistate Tax Commission (1974), at p. 46.

ated their membership. Illinois withdrew in 1975 and Florida in 1976, while Wyoming abandoned its membership on the day probable jurisdiction was noted in this case. Since then, the Indiana Senate has voted 47-3 to withdraw, based on the adoption of bylaws and regulations by the Commission inconsistent with Indiana law.[66] On February 17, 1977, Oklahoma severed its associate affiliation. New York had severed its associate affiliation in 1971, fearing a loss of sovereignty to the Multistate Tax Commission, an entity which can exercise continuous power uncontrolled by any one state.[67] Wisconsin also views the Commission as a threat to the sovereignty of the states. Arizona strongly opposes the Commission, considering it essentially a fourth level of government. Alabama agreed to join the Compact only if it sought and obtained congressional approval. These circumstances show that the Compact is more than an informal means for the exchange of information. It is, indeed, exactly the sort of "Agreement or Compact" which was guarded against in the Constitution in the absence of the "Consent of Congress."

[66] The Indiana bill is Indiana Senate Bill 414. Bills have also been introduced in Texas and Washington to withdraw those states from the Compact.

[67] *See* the discussion, and the letter of former Governor Rockefeller, at P-H STATE AND LOCAL TAXES, ALL STATES UNIT ¶ 6612. *See also* Sharpe, *State Taxation of Inter-State Business and the Multistate Tax Compact: The Search for a Delicate Uniformity*, 11 COL. J. LAW & SOC. PROBLEMS 231 (1975).

IV. THE COMMERCE CLAUSE AND FOURTEENTH AMENDMENT

A. The Multistate Tax Compact Burdens Interstate Commerce And Deprives Multistate Businesses Of Fourteenth Amendment Guarantees.

The operation of the Multistate Tax Commission, unchecked by any one state and acting through regulations, bylaws, and practices, has produced serious abuses which burden interstate commerce and violate the guarantees of the Fourteenth Amendment. Taxes may be imposed by state officials under "advisory" regulations not adopted by the taxing state, and perhaps even in conflict with the laws of the state.[68]

During the pendency of this case in the court below, the Commission "suggested" that a subpoena campaign be conducted by the member states against many of the taxpayers involved in this case.[69] The

[68] For example, the Uniform Division for Income Tax Purposes Act ("UDITPA"), 7 Uniform Laws Annotated 365 (1970), does not call for combined reporting and specifically recognizes the distinction between business and non-business income. As discussed at p. 27 above, however, the Commission has issued "advisory" regulations negating important sections of UDITPA instead of seeking amendments to the law in the Compact states where UDITPA has been enacted. The Commission has then subjected multistate business to "advisory" audits under its own regulations, and its tax "recommendations" were often accepted by the executive officials in charge of taxation in the various states, even in those states in which the legislature had adopted UDITPA and not the Commission's regulations. Commission representatives have indicated that the regulations are inconsistent with UDITPA and reflect the Commission's own view of the proper method of taxing interstate commerce, though it is not the system enacted by a majority of the states through UDITPA. *See* the explanation of the Commission's General Counsel in Dexter, *Taxation of Income From Intangibles of Multistate-Multinational Corporations*, 29 VAND. L. REV. 401 (1976).

[69] This is referred to in the Affidavit of Thomas McGanney. App. pp. 47, 51.

subpoenas were to direct the taxpayers to produce all interstate and international books and records before the personnel of the Commission. At least eight Compact states complied with the Commission's "suggestion," and subpoenas were served on several corporations demanding production of literally all the books and records of both parents and subsidiaries, in the various state capitals for the inspection of the Commission.

In addition to this harassment, the Commission's plan included the further "suggestion" that, if the taxpayers declined to appear before the Commission, arbitrary assessments were to be issued.[70] These arbitrary assessments were to be made even if the taxpayers offered to submit to audits by regular state personnel, or to extend the statutes of limitation pending the outcome of this case. The taxpayers were not to be allowed to present evidence on their tax liability, nor were the arbitrary assessments to be lifted unless the taxpayers recognized the Commission and submitted to multistate audits.

The State of Hawaii, however, after issuing subpoenas pursuant to the "suggestions" of the Commission, found that the alternatives to the subpoenas and Commission audits proposed by two of the taxpayers were reasonable. The Director of Taxation in Hawaii wrote to the Executive Director of the Commission:

> "In your October 26 memorandum regarding this matter, you proposed the issuance of arbitrary assessments; however, we are unable to arrive at a logical basis for an assessment in view of the

[70] The arbitrary assessments were referred to in the Affidavit of Thomas McGanney, App. pp. 51, 52.

> fact that income tax audits have not resulted in any significant assessments. In other words, most corporations appear to be in substantial compliance with our income tax law."[71]

The Commission immediately replied, stressing that "[i]t is important to recognize that the question at hand involves not only the amount of the liabilities of these companies, but whether they can defeat the entire audit program."[72] The Commission's letter to Hawaii also stated:

> "... the type of action that we have outlined, that of proceeding with the matter unless and until some court stops us, has resulted within the last few weeks in compliance by several corporations which had previously resisted. One of them is a corporation which has been seeking to join the lawsuit. Its capitulation is particularly significant. . . . We must keep the pressure on in order to insure success."[73]

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[71] This letter is referred to and quoted from in the Affidavit of Thomas McGanney, App. p. 51. The entire letter was attached to the Affidavit.

[72] The Commission's letter is referred to and quoted from in the Affidavit of Thomas McGanney, App. pp. 51-52. The entire letter was attached to the affidavit.

[73] Such practices were ordered stopped by the North Dakota Supreme Court. *Colgate-Palmolive Co.* v. *Dorgan*, 225 N.W. 2d 278 (N.D. 1974). Proceedings in connection with a subpoena issued pursuant to the Commission's campaign were also stopped by a federal district court in North Dakota, with Judge Van Sickle noting that the Commission's campaign was no more than an attempt to "end run" around this case, "and thus activate the functioning of the Multistate Tax Commission" during the pendency of this case. *See Dorgan* v. *International Business Machines Corp. and International Harvester Co.*, North Dakota State Tax Reports, CCH # 200-149 (October 24, 1974).

Finally, the Commission's letter suggested the arbitrary figures that should be used by Hawaii in connection with the plan being implemented by the Commission in the Compact states:

> "Accordingly, it is most important that you follow through and issue an assessment in accordance with the procedures which we have established for all of our member states previously. Our advisors have suggested that an assessment in the amount of $7,500.00 per year against Bristol-Myers and $12,000.00 per year against Colgate-Palmolive would be appropriate. Now that Sperry & Hutchinson has also ignored your subpoena, an assessment against them in the amount of $7,-500.00 per year has been suggested."[74]

This course of conduct is evidence that the Commission and Compact states may impose burdens on commerce and ignore the guarantees of the Fourteenth Amendment on a wholesale and concerted basis. Accordingly, the Compact should not be declared valid until Congress has considered the possibility that such conduct will recur and has evaluated the propriety and impact of such conduct, and has then acted affirmatively to approve the Compact.

CONCLUSION

The Multistate Tax Compact is called a compact. It looks like a compact; it acts like a compact; and the consent of Congress was sought for it as a compact. Indeed it is a compact, of the very sort that Article I, Section 10, was intended to cover. Accordingly, the judgment of the court below should be reversed, and

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[74] This letter was attached to the Affidavit of Thomas McGanney, App. p. 47.

the Multistate Tax Compact should be declared invalid unless and until the consent of Congress is obtained.

Respectfully submitted,

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SUPPLEMENT A

INTERSTATE COMPACTS TO WHICH CONGRESS HAS GIVEN ITS CONSENT, 1789-1976

This List Was Compiled From Statutes at Large and Is Presented in Chronological Order. The List Includes Congressional Consent to Amendments, New Members, and Renewals.

COMPACT	CONGRESSIONAL CONSENT
Virginia and Kentucky Compact of 1789	1 Stat. 189 (1791)
Kentucky and Tennessee Boundary Compact of 1820	3 Stat. 609 (1820)
Chesapeake & Ohio Canal Company Compact	4 Stat. 101 (1825) 4 Stat. 292 (1820) 4 Stat. 602 (1832)
New York and New Jersey Compact of 1833	4 Stat. 708 (1834)
Missouri and Arkansas Boundary Compact of 1846	9 Stat. 211 (1948)
Massachusetts and New York Boundary Compact of 1853	10 Stat. 602 (1955)
Massachusetts and Rhode Island Boundary Settlement of 1859	11 Stat. 382 (1858)
Virginia and West Virginia Debt Agreement	12 Stat. 633 (1862)
Virginia and West Virginia Boundary Agreement of 1866	14 Stat. 350 (1866)
Virginia and Maryland Boundary Agreement of 1877	20 Stat. 481 (1879)

Compact	Congressional Consent
New York and Vermont Boundary Agreement of 1880	21 Stat. 72 (1880)
New York and Connecticut Boundary Agreement of 1879	21 Stat. 351 (1881)
Connecticut and Rhode Island Boundary Agreement of 1887	25 Stat. 553 (1888)
New York and Pennsylvania Boundary Agreement of 1886	26 Stat. 329 (1890)
South Dakota and Nebraska Boundary Agreement of 1897	30 Stat. 214 (1897)
Virginia and Tennessee Boundary Agreement of 1901	31 Stat. 1465 (1901)
South Dakota and Nebraska Boundary Agreement of 1905	33 Stat. 820 (1905)
New Jersey and Delaware Agreement of 1905	34 Stat. 858 (1907)
Mississippi and Arkansas Agreement of 1909	35 Stat. 1161 (1909)
Massachusetts and Connecticut Boundary Agreement of 1914	38 Stat. 727 (1914)
Minnesota, North Dakota, and South Dakota Agreements of 1917	40 Stat. 250 (1917) 40 Stat. 266 (1917)
Oregon and Washington Ageement of 1915	40 Stat. 515 (1918)

Compact	Congressional Consent
Wisconsin and Minnesota Boundary Agreement of 1917	40 Stat. 959 (1918)
New York and New Jersey Tunnel Agreement of 1919	41 Stat. 158 (1919)
South Dakota and Minnesota Agreement of 1917	41 Stat. 1447 (1921)
Pennsylvania and Delaware Boundary Agreement of 1921	42 Stat. 104 (1921)
Colorado River Compact of 1921	42 Stat. 171 (1921)
Port of New York Authority Agreement of 1921	42 Stat. 174 (1921) 42 Stat. 822 (1922)
Kansas City Waterworks Agreement of 1922	42 Stat. 1058 (1922)
New York and Connecticut Boundary Agreement	43 Stat. 731 (1925)
The La Plata River Compact	43 Stat. 796 (1925)
South Platte River Compact	44 Stat. 195 (1926)
Lake Champlain Bridge Compact	45 Stat. 120 (1928)
Menominee River Bridge Compact	45 Stat. 300 (1928)
Delaware River Port Authority Compact	47 Stat. 308 (1932)
Buffalo and Fort Erie Bridge Authority Compact	48 Stat. 662 (1934)
New England Interstate Correction Compact (Advance consent under Federal Crime Control Act)	48 Stat. 909 (1934)

Compact	Congressional Consent
Lake Champlain Bridge Commission, amendatory agreement between New York and Vermont for creation of, ratified	49 Stat. 736, 1472 (1936)
Interstate Sanitation District, agreement between New York, New Jersey, and Connecticut	49 Stat. 932 (1935)
Interstate Compact to Conserve Oil and Gas	49 Stat. 939 (1935)
Delaware River Joint Toll Bridge Commission, Pennsylvania and New Jersey	49 Stat. 1058 (1935)
Flood-control, etc.—	
Consent granted to certain states	49 Stat. 1490 (1936)
Consent of Congress granted; ratification of	49 Stat. 1571 (1936)
Park, parkway, and recreational-area programs, consent of Congress granted to, with reference to planning, etc.	49 Stat. 1895 (1936)
Maine-New Hampshire Interstate Bridge Authority	50 Stat. 538 (1937)
Yellowstone River, division of waters, Mont. and Wyo.	50 Stat. 551 (1937)
Oil and gas conservation, continuance of	50 Stat. 617 (1937)
Minimum wage, etc., Mass., N. H., and R. I.	50 Stat. 633 (1937)
Palisades Interstate Park Commission, creation of, New York and New Jersey	50 Stat. 719 (1937)

Compact	Congressional Consent
Pymatuning Lake, relating to, Ohio and Pennsylvania	50 Stat. 865 (1937)
Potomac Valley conservancy district, negotiation for creation of	50 Stat. 884 (1937)
Red River of the North, compact between Minnesota, North and South Dakota regarding waters of	52 Stat. 150 (1938)
Great Lakes, agreements between bordering States with respect to fishing in waters of	52 Stat. 200 (1938)
Snake River, division of waters, Idaho and Wyoming	52 Stat. 379 (1938)
New Jersey and Pennsylvania, tunnel construction, etc., under Delaware River	52 Stat. 1163 (1938)
Rio Grande, signed Mar. 18, 1938	53 Stat. 785 (1939)
Oil and gas conservation, Oklahoma, Texas, California, and New Mexico, extension	53 Stat. 1071 (1939)
Iowa and Missouri, establishment of boundary	53 Stat. 1345 (1939)
Little Missouri River, division of waters of	54 Stat. 382 (1940)
Yellowstone River, division of water supply, authorized	54 Stat. 399 (1940)
Potomac Valley Conservancy District	54 Stat. 748 (1940)
Ohio River Valley Water Sanitation Compact	54 Stat. 752 (1940)

Compact	Congressional Consent
Oil and gas conservation, extension	55 Stat. 666 (1941)
Atlantic Seaboard, fisheries	56 Stat. 267 (1942)
Republican River, division of waters	56 Stat. 736 (1942)
Appropriation for salary and expenses of U.S. representative, authorized	56 Stat. 736 (1942)
Republican River, division of waters	57 Stat. 86 (1943)
Cumberland Gap National Historical Park, entrance into compact for acquisition of property	57 Stat. 86 (1943)
Indiana-Kentucky boundary line	57 Stat. 248 (1943)
Oil and gas conservation	57 Stat. 383 (1943)
Iowa-Nebraska boundary line	57 Stat. 494 (1943)
Belle Fourche River Basin, use of waters	58 Stat. 94 (1944)
Time extension for negotiation, Yellowstone River, division of waters	58 Stat. 117 (1944)
New York-Rhode Island boundary line	58 Stat. 672 (1944)
Arkansas River, division of waters	59 Stat. 53 (1945)
Appropriations for salary and expenses of United States representative, authorized	59 Stat. 53 (1945)
Appropriation for	59 Stat. 649 (1945)

Compact	Congressional Consent
Lake Champlain Bridge Commission, amendatory agreement	59 Stat. 227 (1945)
Pymatuning Lake, amendment of existing compact	59 Stat. 502 (1945)
District of Columbia-Virginia Boundary Compact	59 Stat. 552 (1945)
Costilla Creek Compact	60 Stat. 246 (1946)
Deposit of original in archives of Department of State	60 Stat. 254 (1946)
Rights Reserved	60 Stat. 254 (1946)
Utah, Idaho, and Wyoming, States of, division of waters of Bear River and tributaries	60 Stat. 658 (1946)
Nebraska-Iowa Bridge Corporation and States of Iowa and Nebraska, bridge across Missouri River, agreement respecting	60 Stat. 661 (1946)
Illinois-Missouri Bridge Compact	60 Stat. 847 (1946)
Oil and gas conservation compact, extension and renewal	61 Stat. 316 (1947)
Pacific Marine Fisheries Compact	61 Stat. 429 (1947)
New England Interstate Water Pollution Control Compact	61 Stat. 682 (1947)
Pennsylvania and New Jersey, compact concerning Delaware River Joint Toll Bridge Commission	61 Stat. 752 (1947)

Compact	Congressional Consent
Idaho and Wyoming, division of waters of Snake River	62 Stat. 294 (1948)
Boundary compact, Michigan, Minnesota, and Wisconsin	62 Stat. 1152 (1948)
Water pollution, negotiation of compacts for control of	62 Stat. 1156 (1948)
Upper Colorado River Basin Compact	63 Stat. 31 (1949)
Gulf States Marine Fisheries Compact	63 Stat. 70 (1949)
Crime prevention, cooperation in	63 Stat. 107 (1949)
Arkansas River Compact	63 Stat. 145 (1949)
Funds for payment of U. S. representative in negotiation and participation; retired Army officer as U. S. representative.	63 Stat. 786 (1949)
Yellowstone River, negotiation of agreement for division of waters	63 Stat. 152 (1949)
Pecos River Compact	63 Stat. 159 (1949)
Northeastern Interstate Forest Fire Protection Compact	63 Stat. 271 (1949)
Tennessee-Missouri Bridge Commission	63 Stat. 930 (1949)
Snake River Compact	64 Stat. 29 (1950)
Canadian River, negotiation for apportionment of waters	64 Stat. 93 (1950)
Kansas-Missouri Boundary Compact	64 Stat. 397 (1950)

Compact	Congressional Consent
Atlantic States Marine Fisheries Compact, amendment and repeal of time limitation	64 Stat. 467 (1950)
Missouri and Illinois Bi-State Development Agency and Bi-State Metropolitan District, compact creating	64 Stat. 568 (1950)
Civil defense compacts	64 Stat. 1249 (1951)
Oil and gas conservation compact, extension and renewal	65 Stat. 199 (1951)
Pennsylvania and New Jersey, compact concerning bridge across Delaware River	65 Stat. 650 (1951)
Yellowstone River Compact	65 Stat. 663 (1951)
Sabine River, negotiation for apportionment of waters	65 Stat. 736 (1951)
Delaware River Joint Toll Bridge Commission	66 Stat. 28 (1952)
Northeastern Interstate Forest Fire Protection Compact, Canadian participation	66 Stat. 71 (1952)
Mutual military aid in an emergency by New York, New Jersey, and Pennsylvania	66 Stat. 315 (1952)
Columbia River and tributaries, negotiation for apportionment of waters	66 Stat. 737 (1952)
Canadian River Compact	66 Stat. 737 (1952)
Delaware River Port Authority (Delaware River Joint Commission)	66 Stat. 738, 747 (1952)

Compact	Congressional Consent
Connecticut River Flood Control Compact	67 Stat. 45 (1953)
Water compacts between Nebraska, South Dakota, and Wyoming	67 Stat. 365 (1953)
Western States Compact on higher education	67 Stat. 490 (1953)
Waterfront Commission Compact, New Jersey and New York	67 Stat. 541 (1953)
The Breaks area, development as park by Kentucky and Virginia	67 Stat. 584 (1953)
Alabama and Florida, boundary agreement	68 Stat. 77 (1954)
Columbia River Compact, amendment, inclusion of Nevada and Utah in apportionment of waters	68 Stat. 468 (1954)
Southeastern Interstate Forest Fire Protection Compact	68 Stat. 563 (1954)
Breaks Interstate Park Compact	68 Stat. 571 (1954)
South River Compact	68 Stat. 690 (1954)
South Central Interstate Forest Fire Protection Compact	68 Stat. 783 (1954)
New England Higher Education Compact	68 Stat. 982 (1954)

Compact	Congressional Consent
Arkansas and Oklahoma, development and apportionment of Arkansas River waters	69 Stat. 184 (1955)
Oil and gas conservation, extension	69 Stat. 385 (1955)
Oregon and California, negotiations on apportionment of waters of Klamath River	69 Stat. 613 (1955)
Kansas and Oklahoma, apportionment of waters of Arkansas River	69 Stat. 631 (1955)
Arkansas, Louisiana, Oklahoma, and Texas, apportionment of waters of Red River	69 Stat. 654 (1955)
California and Nevada, distribution of waters of Truckee, Carson, and Walker Rivers Lake Tahoe, and tributaries	69 Stat. 675 (1955)
Mutual military aid in an emergency, between New York or New Jersey and any contiguous States	70 Stat. 247 (1956)
Water pollution, negotiation for prevention and control	70 Stat. 498 (1956)
Middle Atlantic Interstate Forest Fire Protection Compact	70 Stat. 636 (1956)
Mississippi and Arkansas, bistate commission established to study possibility of construction of bridge	70 Stat. 696 (1956)

Compact	Congressional Consent
New York, New Jersey, and Connecticut, smoke and air pollution studies by Interstate Sanitation Commission	70 Stat. 966 (1956)
Illinois-Wisconsin interstate school compact	70 Stat. 973 (1956)
Alaska, District of Columbia, Hawaii, Puerto Rico, and Virgin Islands, in cooperation for prevention of crime	70 Stat. 1020 (1956)
Arizona-California boundary compact	70 Stat. 1124 (1956)
Merrimack River Flood Control Compact	71 Stat. 18 (1957)
Montana, North Dakota, South Dakota and Wyoming, Little Missouri River negotiations	71 Stat. 466 (1957)
Klamath River Basin Compact	71 Stat. 497 (1957)
Bear River Compact	72 Stat. 38 (1958)
Nebraska, Wyoming, and South Dakota, time extension for negotiation	72 Stat. 147 (1958)
Connecticut-Massachusetts flood control	72 Stat. 364 (1958)
Washington and Oregon, boundary	72 Stat. 455 (1958)
Tennessee-Tombigee Waterway Development Compact	72 Stat. 609 (1958)
Highway Safety	72 Stat. 635 (1958)
Tennessee River Basin Water Pollution Control Compact	72 Stat. 823 (1958)

Compact	Congressional Consent
Minnesota and Province of Manitoba, Canada	72 Stat. 1701 (1958)
Oil and gas conservation, extension	73 Stat. 290 (1959)
Airport facilities, development or operation	73 Stat. 333 (1959)
New York-New Jersey Transportation Agency Compact	73 Stat. 575 (1959)
Missouri-Illinois Bi-State Development Agency, additional powers	73 Stat. 582 (1959)
Virginia-West Virginia, boundary	73 Stat. 599 (1959)
Wabash Valley Compact, development and planning	73 Stat. 694 (1959)
Kansas-Nebraska, apportionment of waters of the Big Blue River	74 Stat. 160 (1960)
Maryland-Virginia-District of Columbia; National Capital transportation problems	74 Stat. 544 (1960)
Washington Metropolitan Area Transit Regulation Compact	74 Stat. 1031 (1960)
Arizona-Nevada, boundary revision	75 Stat. 93 (1961)
* Urban planning and development	75 Stat. 170 (1961)

* In this legislation Congress consented in advance to compacts designed to promote urban planning and housing policies; compacts have been formed under this legislation. *See, e.g.*, Delaware Valley Urban Area Compact.

Compact	Congressional Consent
Pennsylvania-Ohio, activity on Pymatuning Lake	75 Stat. 242 (1961)
North Dakota-Minnesota, boundary	75 Stat. 399 (1961)
Nebraska, Wyoming, and South Dakota, time extension for negotiations	75 Stat. 412 (1961)
Delaware River Basin Compact	75 Stat. 688 (1961)
Guam, cooperation in prevention of crime, authorization	76 Stat. 9 (1962)
Texas-Louisiana, waters of the Sabine River, membership	76 Stat. 34 (1962)
Montana-North Dakota-South Dakota-Wyoming, waters of Little Missouri River, time extension for negotiations	76 Stat. 71 (1962)
Southern Interstate Nuclear Compact	76 Stat. 249 (1962)
Delaware-New Jersey Compact	76 Stat. 560 (1962)
Pacific Marine Fisheries Compact, amendment; additional States, participation	76 Stat. 763 (1962)
Washington Metropolitan Area Transit Regulation Compact, amendments, geographical jurisdiction and transportation covered, extension	76 Stat. 764 (1962)
Potomac River Compact of 1958	76 Stat. 797 (1962)
Water pollution disputes, district court jurisdiction	76 Stat. 957 (1962)

Compact	Congressional Consent
Oil and gas, conservation, extension and renewal	77 Stat. 145 (1963)
Hanover, N.H.-Norwich, Vt., establishment of an interstate school district	77 Stat. 332 (1963)
Costilla Creek Compact, Colo.-N. Mex., amendment, allocation of water flow	77 Stat. 350 (1963)
Clean Air Act, cooperative activities under	77 Stat. 393 (1963)
Commercial fisheries research and development	78 Stat. 197 (1964)
New Jersey-Pennsylvania, Delaware River, supplemental agreement	78 Stat. 215 (1964)
Ohio-Pennsylvania amendment	78 Stat. 313 (1964)
Highway safety, District of Columbia participation	78 Stat. 564 (1964)
Breaks Interstate Park Compact, Va.-Ky., amendment, eminent domain provision	78 Stat. 957 (1964)
Motor fuels taxation and taxation proration and reciprocity on interstate buses	79 Stat. 58 (1965)
State Technical Services Act of 1965 Appropriation for effecting provisions	79 Stat. 682 (1965) 79 Stat. 1150 (1965)
Bus taxation proration and reciprocity agreement, Connecticut, Rhode Island, and Vermont, parties to	79 Stat. 1157 (1965)

Compact	Congressional Consent
Arizona and California, boundary between the States	80 Stat. 340 (1966)
Kansas City Area Transportation District and Kansas City Area Transportation Authority	80 Stat. 826 (1966)
Hudson River Basin Compact, negotiation, authorization	80 Stat. 847 (1966)
Bus taxation proration and reciprocity compact, Massachusetts a party	80 Stat. 1156 (1966)
Washington Metropolitan Area Transit Regulation Compact, amendments; transfer of functions, etc.	80 Stat. 1324 (1966)
Missouri-Illinois-Jefferson-Monroe Bridge Commission, creation	80 Stat. 1407 (1966)
Arkansas River Basin Compact, Kansas-Oklahoma	80 Stat. 1409 (1966)
Wheeling Creek Watershed Protection and Flood Prevention District Compact	81 Stat. 553 (1967)
Oil and gas conservation, extension and renewal	81 Stat. 560 (1967)
Bus Taxation proration and reciprocity agreement, Ohio a party	81 Stat. 583 (1967)
Kansas City Area Transportation Authority, additional powers	82 Stat. 338 (1968)

Compact	Congressional Consent
Great Lakes Basin Compact	82 Stat. 414 (1968)
Animas-La Plata Project Compact	82 Stat. 898 (1968)
New Hampshire-Vermont Interstate School Compact	83 Stat. 14 (1969)
Upper Niobrara River Compact	83 Stat. 86 (1969)
Tahoe Regional Planning Compact	83 Stat. 360 (1969)
Oil and Gas Conservation Compact, Interstate, extension	83 Stat. 436 (1969)
Connecticut-New York Railroad Passenger Transportation Compact	83 Stat. 441 (1969)
Pacific Marine Fisheries Compact, amendments	84 Stat. 415 (1970)
Fall of Ohio Interstate Park Compact	84 Stat. 832 (1970)
Potomac Valley Conservancy District, amendments	84 Stat. 856 (1970)
Western Interstate Nuclear Compact	84 Stat. 979 (1970)
Susquehanna River Basin Compact	84 Stat. 1509 (1970)
Kansas-Nebraska Big Blue River Compact	86 Stat. 193 (1972)
Oil and Gas Conservation Compact extension and renewal	86 Stat. 383 (1972)

Compact	Congressional Consent
Washington Metropolitan Transit Authority Compact, amendments	86 Stat. 466, 1000 (1972)
Arkansas-River Basin Compact	87 Stat. 569 (1973)
Cumbres and Toltec Scenic Railroad Compact	88 Stat. 1421 (1974)
District of Columbia Interstate Agreement on Educational Personnel	88 Stat. 1612 (1974)
Washington Metropolitan Area Transit Regulation Compact	90 Stat. 672 (1976)
New Hampshire-Vermont Interstate Sewage Disposal Compact	90 Stat. 1221 (1976)
Oil and Gas Conservation Compact, Interstate, renewal	90 Stat. 2365 (1976)

SUPPLEMENT B

INTERSTATE COMPACTS 1783-1966

This list was compiled by the Council of State Governments and is copied from the Council's publication, *Interstate Compacts 1783-1966.* It is presented in alphabetical order. Although some of the material in this list may duplicate that compiled from the *Statutes at Large,* additional information, including the member states and a description of the compacts, is included.

AGREEMENT ON DETAINERS (see DETAINERS, AGREEMENT ON)

ALABAMA-FLORIDA BOUNDARY COMPACT

Alabama: 1953 Florida: 1953 Congressional consent: 1954

ARIZONA-CALIFORNIA BOUNDARY COMPACT

Arizona: 1963 California: 1963 Congressional consent: 1966

ARIZONA-NEVADA BOUNDARY COMPACT

Arizona: 1960 Nevada: 1960 Congressional consent: 1961

ARKANSAS-MISSISSIPPI BOUNDARY COMPACT

Fixes boundary line and settles criminal jurisdiction on the Mississippi River.

Arkansas: 1909 Mississippi: 1910 Congressional consent: 1909

ARKANSAS-MISSOURI BOUNDARY COMPACT

Arkansas: 1846 Missouri: 1847 Congressional consent: 1848

ARKANSAS RIVER COMPACT OF 1949

Creates the Arkansas River Compact Administration to apportion the waters of the Arkansas River.

Colorado: 1949 Kansas: 1949 Congressional consent: 1949

ARKANSAS RIVER COMPACT OF 1965

Creates the Kansas-Oklahoma Arkansas River Commission to apportion the waters of the Arkansas River; promotes an active pollution abatement program for the waters of the Arkansas River basin.

Kansas: 1966 Oklahoma: 1965 Congressional consent: 1966

By separate enactments in 1955, Congress authorized negotiations for two Arkansas River compacts: between Kansas and Oklahoma; between Arkansas and Oklahoma. The latter two states have not yet adopted such a compact.

ARKANSAS-TENNESSEE BOUNDARY COMPACT

Fixes boundary line and settles criminal jurisdiction on the Mississippi River.

Arkansas: 1909 Tennessee: 1915 Congressional consent: 1909

ATLANTIC STATES MARINE FISHERIES COMPACT

Establishes a commission to promote better utilization of fisheries along the Atlantic seaboard.

Connecticut: 1945
Delaware: 1941
Florida: 1945
Georgia: 1943
Maine: 1942
Maryland: 1941
Massachusetts: 1941
New Hampshire: 1941
New Jersey: 1941
New York: 1941
North Carolina: 1949
Pennsylvania: 1943
Rhode Island: 1941
South Carolina: 1942
Virginia: 1942
Congressional consent: 1942

In 1950 Congress consented to an amendment permitting two or more states to delegate to a special section of the commission, composed of their own commissioners, such powers as they may desire to confer for the management of a fishery shared in common. Thus far, Massachusetts (1948); Maine, New Hampshire, North Carolina, Pennsylvania and Rhode Island (1949); New Jersey (1950) and Connecticut (1951) have adopted the amendment.

BEAR RIVER COMPACT

Creates a commission to apportion the waters of the Bear River.

Idaho: 1955 Wyoming: 1957 Congressional consent: 1958
Utah: 1955

Belle Fourche River Compact

Apportions the waters of the Belle Fourche River.

South Dakota: 1943 Wyoming: 1943 Congressional consent: 1944

Bi-State Development Agency Compact

Establishes the Bi-State Development Agency for the St. Louis metropolitan area.

Illinois: 1949 Missouri: 1949 Congressional consent: 1950

In 1959 both states and Congress approved an amendment granting additional powers to the bi-state agency.

Breaks Interstate Park Compact

Establishes the Breaks Interstate Park Commission and park.

Kentucky: 1954 Virginia: 1954 Congressional consent: 1954

In 1964 both states and Congress approved an amendment authorizing the commission to exercise right of eminent domain to acquire property located within each state.

Buffalo and Fort Erie Bridge Authority Compact

Creates the Buffalo and Fort Erie Public Bridge Authority to acquire all assets and property of the Buffalo and Fort Erie Public Bridge Company.

New York: 1933 Canada: 1934 Congressional consent: 1934

Earlier and subsequent agreements between New York and the Government of Canada are too complex for enumeration here.

Bus Taxation Proration and Reciprocity Agreement

Prorates registration and fixed fees among party states for bus companies engaged in both inter- and intrastate operations.

Connecticut: 1965
Maine: 1963
Maryland: 1964
Massachusetts: 1965
New Hampshire: 1963
New York: 1964
Pennsylvania: 1963
Rhode Island: 1965
Vermont: 1965
District of Columbia: 1965
Congressional consent: 1965[1]

All states, U. S. territories and possessions, Canadian provinces and states of Mexico are eligible.

Canada and New York International Bridge Compact

Establishes a consolidated international company to construct a railroad bridge across the Niagara River.

New York: 1869 Canada: 1869 Congressional consent: 1870

Canadian River Compact

Establishes a commission to apportion the waters of the Canadian River.

New Mexico: 1951
Oklahoma: 1951
Texas: 1951
Congressional consent: 1952

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[1] For all states, except Massachusetts and the District of Columbia, Congressional consent was given in 1965. Congress approved Massachusetts' entry into the compact in 1966. Individual Congressional consent action is required for each state adopting this compact.

Civil Defense and Disaster Compact, Interstate

Establishes the required legal framework for states to provide mutual military aid and disaster assistance.

Alabama: 1951
Alaska: 1951
Arizona: 1951
Arkansas: 1953
California: 1950
Colorado: 1950
Connecticut: 1951
Delaware: 1951
Florida: 1951
Georgia: 1951
Hawaii: 1951
Idaho: 1951
Illinois: 1951
Indiana: 1949
Iowa: 1959
Kansas: 1951
Kentucky: 1952
Maine: 1949
Maryland: 1949
Massachusetts: 1950
Michigan: 1951
Minnesota: 1951
Mississippi: 1952
Missouri: 1951
Montana: 1951
Nebraska: 1951
Nevada: 1953
New Hampshire: 1949
New Jersey: 1951
New Mexico: 1951
New York: 1951
North Carolina: 1951
North Dakota: 1951
Ohio: 1949
Oklahoma: 1951
Oregon: 1949
Pennsylvania: 1951
Rhode Island: 1950
South Carolina: 1950
South Dakota: 1951
Tennessee: 1951
Texas: 1951
Utah: 1951
Vermont: 1951
Virginia: 1952
Washington: 1951
West Virginia: 1951
Wisconsin: 1951
Wyoming: 1951
District of Columbia: 1950
Guam: 1952
Puerto Rico: 1951
Virgin Islands: 1950
Congressional consent: 1950[2]

The model civil defense compact was developed in the early fifties, to which all states are eligible. The jurisdictions listed have adopted either this compact or variants thereof, but the details of particular adoptions are too complex for enumeration here. The state attorney general has declared Kansas' participation invalid.

[2] This compact was consented to in advance by Congress (see Federal Civil Defense Act of 1950, Title II, § 201(g)).

Colorado River Compact

Apportions the waters of the upper and lower basins of the Colorado River.

Arizona: 1944
California: 1929
Colorado: 1925
Nevada: 1925
New Mexico: 1925
Utah: 1929
Wyoming: 1925
Congressional consent: 1928

In 1921 Congress authorized these seven states to enter into a compact no later than 1923. All states, except Arizona, adopted a compact in 1923. The six compacting states adopted an amendment in 1925 to waive the requirement of approval by all seven states. Congress accepted the revision in the 1928 Boulder Canyon Project Act which, however, required California's approval. California adopted the amended compact in 1929.

Columbia River Jurisdiction Compact

Oregon: 1915
Washington: 1915
Congressional consent: 1918

This compact is also known as the Oregon-Washington Fisheries Compact.

Compact for Education (see Education, Compact for)

Compact on Taxation of Motor Fuels Consumed by Interstate Buses (see Taxation of Motor Fuels Consumed by Interstate Buses, Compact on)

Connecticut-Massachusetts Boundary Compact

Connecticut: 1913
Massachusetts: 1908
Congressional consent: 1914

CONNECTICUT-NEW YORK BOUNDARY COMPACT OF 1880

Connecticut: 1880 New York: 1880 Congressional consent: 1881

CONNECTICUT-NEW YORK BOUNDARY COMPACT OF 1912

Redefines the boundary line set by the 1880 compact.

Connecticut: 1913 New York: 1912 Congressional consent: 1925

CONNECTICUT-RHODE ISLAND BOUNDARY COMPACT

Connecticut: 1887 Rhode Island: 1887 Congressional consent: 1888

CONNECTICUT RIVER VALLEY FLOOD CONTROL COMPACT

Creates the Connecticut River Valley Flood Control Commission and provides for the financial reimbursement by downstream states for economic loss to political subdivisions in which flood control reservoirs are located.

Connecticut: 1951 New Hampshire: 1951 Congressional consent: 1953
Massachusetts: 1951 Vermont: 1951

An earlier compact was adopted by the states in 1937. However Congress withheld approval as the compact was believed to have exceeded the purpose and intent of the 1936 Flood Control Act.

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COSTILLA CREEK COMPACT

Establishes a commission to apportion the waters of the Costilla Creek.

Colorado: 1945 New Mexico: 1945 Congressional consent: 1946

In 1963 both states and Congress approved an amendment to perfect further efficient utilization of the waters.

CUMBERLAND GAP NATIONAL PARK COMPACT

Makes possible the setting up of the Cumberland Gap National Park.

Kentucky: 1943 Virginia: 1943 Congressional consent: 1943
Tennessee: 1943

DELAWARE-PENNSYLVANIA BOUNDARY COMPACT

Delaware: 1921 Pennsylvania: 1897 Congressional consent: 1921

DELAWARE RIVER AND BAY AUTHORITY COMPACT

Establishes an authority to provide for the orderly development of transportation, terminal and other commercial facilities in the bi-state area bordering the river and bay.

Delaware: 1961 New Jersey: 1961 Congressional consent: 1962

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DELAWARE RIVER BASIN COMPACT

Establishes the Delaware River Basin Commission as a regional multi-purpose water resources agency.

Delaware: 1961 New York: 1961 U. S.: eligible to join
New Jersey: 1961 Pennsylvania: 1961 Congressional consent: 1961

Delaware River Compact of 1783

Establishes jurisdiction over certain islands in the Delaware River.

New Jersey: 1783 Pennsylvania: 1783

New Jersey (1953) and Pennsylvania (1955) adopted an amendment permitting construction of certain dams on the Delaware River. Congress has not approved the amendment.

Delaware River Compact of 1786

Provides for improvement of navigation on the Delaware River.

New Jersey: 1787 Pennsylvania: 1786

Delaware River Joint Toll Bridge Compact

Establishes the Delaware River Joint Toll Bridge Commission to acquire, construct and administer toll and free bridges across the Delaware River between New Jersey and Pennsylvania.

New Jersey: 1931 Pennsylvania: 1931 Congressional consent: 1935

In 1947 both states and Congress approved an amendment authorizing their respective governors to enter into supplemental agreements to acquire property, construct additional bridges and collect tolls. A second amendment extended the powers and jurisdiction of the commission (New Jersey and Pennsylvania, 1951; Congressional consent, 1952). A third amendment extended the commission's functions to port facilities (New Jersey and Pennsylvania, 1953). Congressional consent to this amendment has not been obtained.

Delaware River Jurisdiction Compact

Establishes boundary jurisdiction and fisheries regulations.

Delaware: 1905 New Jersey: 1905 Congressional consent: 1907

Delaware River Port Authority Compact

Sets up a commission to construct and operate bridges, develop port facilities shared in common by both states and develop a rapid transit system.

New Jersey: 1931 Pennsylvania: 1931 Congressional consent: 1932

Amended in 1951 by both states and approved by Congress in 1952 to rename the Delaware River Joint Commission as the Delaware River Port Authority and to provide for planning, development, and operation of joint facilities. A section was also added regarding rapid transit. Both states in 1963 and Congress in 1964 approved an amendment authorizing the agency to construct new bridges and operate ferries at certain points across the Delaware River.

Delaware Valley Urban Area Compact

Creates a commission to plan for the orderly development of the Delaware Valley Area centering on Philadelphia.

New Jersey: 1966 Pennsylvania: 1965 Congressional consent: 1961[3]

[3] This compact was consented to in advance by Congress (see the 1961 amendment to the National Housing Act, 75 *Stat.* 170, granting Congressional consent to all future compacts for cooperative efforts and mutual assistance in the comprehensive planning for the physical growth and development of interstate metropolitan or other urban areas). This compact is especially noteworthy for inclusion on the commission of representatives from local governments.

DETAINERS, AGREEMENT ON

Facilitates speedy disposition of indictments, information or complaints filed against prisoners of one state by officials of another state.

California: 1963
Connecticut: 1957
Hawaii: 1965
Iowa: 1965
Maryland: 1965
Massachusetts: 1965
Michigan: 1961
Montana: 1963
Nebraska: 1963
New Hampshire: 1959
New Jersey: 1958
New York: 1957
North Carolina: 1965
Pennsylvania: 1959
South Carolina: 1965
U. S.: eligible to join
Congressional consent: 1934[4]

All states, U. S. territories and possessions are eligible.

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DISTRICT OF COLUMBIA-VIRGINIA BOUNDARY COMPACT

Establishes a boundary line between the District of Columbia and Virginia.

Virginia: 1946
District of Columbia: 1945
Congressional consent: 1945

Congress consented to the compact on behalf of the District of Columbia.

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[4] This compact was consented to in advance by Congress (see the Federal Crime Control Act of 1934). This Act was repealed and re-enacted in 1949 in order to shift it from Title 18 to Title 4.

DRIVER LICENSE COMPACT

Provides for exchange of information on citations received by non-resident motorists for violations of motor vehicle or traffic laws.

Alabama: 1966
Arizona: 1963
California: 1963
Colorado: 1965
Delaware: 1964
Idaho: 1963
Illinois: 1963
Iowa: 1965
Kansas: 1965
Maine: 1963
Mississippi: 1962
Montana: 1963
Nebraska: 1963
Nevada: 1961
New Jersey: 1966
New Mexico: 1963
New York: 1965
Oregon: 1963
Tennessee: 1965
Utah: 1965
Washington: 1963
Congressional consent: 1958[5]

All states, U. S. territories and possessions are eligible.

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[5] This compact was consented to in advance by Congress (see the Federal Highway Safety Act of 1958).

Establishes an interstate study and recommendatory commission to serve as a forum for the development of educational policy.

Alabama: 1966[6]
Alaska: 1966
Arizona: 1966[6]
Arkansas: 1965
California: 1966
Colorado: 1966[6]
Delaware: 1966
Georgia: 1966[6]
Hawaii: 1966
Idaho: 1966[6]
Illinois: 1966[6]
Iowa: 1966[6]
Kentucky: 1966[6]
Louisiana: 1966[6]
Maryland: 1966
Minnesota: 1965[6]
Missouri: 1966[6]
New Hampshire: 1966[6]
New Jersey: 1966
New Mexico: 1966
New York: 1966
North Dakota: 1966[6]
Ohio: 1965[6]
Oklahoma: 1966[6]
Oregon: 1966[6]
Rhode Island: 1965
South Carolina: 1966
Tennessee: 1966[6]
Texas: 1965[6]
Utah: 1966[6]
Vermont: 1966[6]
Washington: 1966[6]
West Virginia: 1966[6]
Wisconsin: 1966
Wyoming: 1966[6]
American Samoa: 1966[6]
Puerto Rico: 1966
Virgin Islands: 1965
Congressional consent: not required

All state, U.S. territories and possessions are eligible. States participating by executive order must re-adopt the compact by legislative action not later than December 31, 1967. In June, 1966, the Education Commission amended portions of the compact regarding composition of the steering committee and terms for members thereof.

[6] By executive order.

GEORGIA-NORTH CAROLINA BOUNDARY COMPACT

Georgia: 1817
North Carolina: 1819

Congressional consent, although not formally rendered, is implied [see *Virginia* v. *Tennessee* (1893), 148 U.S. 503, 13 *Sup. Ct.* 728].

GREAT LAKES BASIN COMPACT

Creates a commission to undertake studies of the water resources of the Great Lakes basin and to make recommendations with respect to their use.

Illinois: 1955
Indiana: 1955
Michigan: 1955
Minnesota: 1955
New York: 1960
Ohio: 1963
Pennsylvania: 1956
Wisconsin: 1955
Congressional consent: not required

This compact is open to the Canadian provinces of Ontario and Quebec.

GULF STATES MARINE FISHERIES COMPACT

Establishes a commission to protect fisheries along the gulf coast.

Alabama: 1947
Florida: 1947
Louisiana: 1948
Mississippi: 1950
Texas: 1949
Congressional consent: 1949

Illinois-Missouri and Jefferson-Monroe Bridge Compact

Creates a commission to plan, construct and operate a bridge across the Mississippi River.

Illinois: 1965 Missouri: 1965 Congressional consent: 1946[7]

Illinois-Missouri Bridge Compact

Creates a commission to construct a bridge across the Mississippi River at a point near Ste. Genevieve, Missouri.

Illinois: 1965 Missouri: 1965 Congressional consent: 1946[8]

An earlier proposal was adopted by Missouri in 1961. No action was taken by Illinois.

Indiana-Kentucky Boundary Compact

Indiana: 1943 Kentucky: 1942 Congressional consent: 1943

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[7] This compact was consented to in advance by Congress (see the Federal General Bridge Act of 1946).

[8] This compact was consented to in advance by Congress (see the Federal General Bridge Act of 1946).

Interpleader Compact

Allows a court to acquire personal jurisdiction over adverse claimants to property located anywhere within one of the compacting states.

New Hampshire: 1957 New York: 1957 Congressional consent:
New Jersey: 1957 Pennsylvania: 1956 not required

All states, U. S. territories and possessions, as well as any foreign jurisdiction, are eligible. An earlier version, now superseded, was ratified by New York in 1954 and Maine in 1955.

Interstate Civil Defense and Disaster Compact (see Civil Defense and Disaster Compact, Interstate)

Interstate Compact for Supervision of Parolees and Probationers (see Parolees and Probationers, Interstate Compact for Supervision of)

Interstate Compact on Juveniles (see Juveniles, Interstate Compact on)

Interstate Compact on Mental Health (see Mental Health, Interstate Compact on)

INTERSTATE COMPACT ON PLACEMENT OF CHILDREN (see PLACEMENT OF CHILDREN, INTERSTATE COMPACT ON)

INTERSTATE COMPACT ON PUBLIC SCHOOL ADMINISTRATION (see SCHOOL DISTRICT COMPACT, INTERSTATE)

INTERSTATE COMPACT TO CONSERVE OIL AND GAS (see OIL AND GAS, INTERSTATE COMPACT TO CONSERVE)

INTERSTATE LIBRARY COMPACT (see LIBRARY COMPACT, INTERSTATE)

INTERSTATE SANITATION COMPACT (see TRI-STATE COMPACT)

INTERSTATE COMPACT ON WELFARE SERVICES (see WELFARE SERVICES, INTERSTATE COMPACT ON)

IOWA-NEBRASKA BOUNDARY COMPACT

Iowa: 1939 Missouri: 1939 Congressional consent: 1939

IOWA-NEBRASKA BOUNDARY COMPACT

Iowa: 1943 Nebraska: 1943 Congressional consent: 1943

JUVENILES, INTERSTATE COMPACT ON

Establishes cooperative procedures for the out-of-state supervision of juveniles and sets up procedures for their return.

Alabama: 1965
Alaska: 1960[11]
Arizona: 1961[9,10]
Arkansas: 1957
California: 1955[11]
Colorado: 1957[9]
Connecticut: 1957
Delaware: 1963
Florida: 1957[9,10]
Hawaii: 1955
Idaho: 1961[9,10]
Illinois: 1961
Indiana: 1957
Iowa: 1961[11]
Kansas: 1965[9]
Kentucky: 1960[9,10]
Louisiana: 1958[9,10]
Maine: 1955
Maryland: 1966[9,10,11]
Massachusetts: 1955[9,10]
Michigan: 1962
Minnesota: 1951
Mississippi: 1958[9,10]
Missouri: 1955
Nebraska: 1963[11]
Nevada: 1957
New Hampshire: 1957
New Jersey: 1955
New York: 1955
North Carolina: 1963
Ohio: 1957
Oregon: 1959
Pennsylvania: 1956[9]
Rhode Island: 1957[10]
South Dakota: 1961
Tennessee: 1955
Texas: 1965[9,10]
Utah: 1955
Virginia: 1956
Washington: 1955
West Virginia: 1963[9,10]
Wisconsin: 1957
Wyoming: 1965
Congressional consent: not required

All states, U. S. territories and possessions are eligible.

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[9] Adopted Optional Runaway article on following dates: 1957 (Colorado, Florida, Pennsylvania); 1958 (Louisiana, Massachusetts, Mississippi); 1960 Kentucky); 1961 (Arizona, Idaho); 1963 (West Virginia); 1965 (Kansas, Texas); 1966 (Maryland).

[10] Adopted the Rendition amendment on following dates: 1957 (Florida, Rhode Island); 1958 (Louisiana, Massachusetts, Mississippi); 1960 (Kentucky); 1961 (Arizona, Idaho); 1963 (West Virginia); 1965 (Texas); 1966 (Maryland).

[11] Adopted the Out-of-State Confinement amendment on following dates: 1965 (California, Iowa, Nebraska); 1966 (Alaska, Maryland).

Kansas City Area Transportation Compact

Empowers a metropolitan area transit district to construct and operate a transit system.

Kansas: 1965 Missouri: 1965 Congressional consent: 1966

Kansas-Missouri Boundary Compact

Kansas: 1949 Missouri: 1949 Congressional consent: 1950

Kentucky-Tennessee Boundary Compact

Kentucky: 1820 Tennessee: 1819 Congressional consent: 1820

Kentucky-Virginia Jurisdiction Compact

Determined rights and interests in lands severed from Virginia; establishes jurisdiction on the Ohio River.

Kentucky: 1789 Virginia: 1789 Congressional consent: 1791

Klamath River Compact

Creates a commission to apportion the waters of the Klamath River and provides for pollution control.

California: 1957 Oregon: 1957 Congressional consent: 1957

Lake Champlain Bridge Compact

Creates the Lake Champlain Bridge Commission.

New York: 1927 Vermont: 1927 Congressional consent: 1928

New York and Vermont in 1957 and Congress in 1958 approved an amendment providing for the continued toll operation of bridges.

La Plata River Compact

Creates a commission to apportion the waters of the LaPlata River.

Colorado: 1923 New Mexico: 1923 Congressional consent: 1925

Library Compact, Interstate

Permits contiguous states to establish joint library districts.

Idaho: 1965
Maine: 1963
Massachusetts: 1963
New Hampshire: 1963
New York: 1963
North Dakota: 1965
Oregon: 1965
Rhode Island: 1963
Vermont: 1963
Washington: 1965
Wyoming: 1965
Congressional consent: not required

All states are eligible. Illinois and Iowa adopted a variant version in 1961.

MAINE-NEW HAMPSHIRE INTERSTATE BRIDGE COMPACT

Creates the Maine-New Hampshire Interstate Bridge Authority.

Maine: 1937 New Hampshire: 1931 Congressional consent: 1937

MARYLAND-VIRGINIA BOUNDARY COMPACT

Maryland: 1876 Virginia: 1878 Congressional consent: 1879

MASSACHUSETTS-NEW HAMPSHIRE BOUNDARY COMPACT OF 1889

Massachusetts: 1890 New Hampshire 1889

Congressional consent, although not formally rendered, is implied [see *Virginia* v. *Tennessee* (1893), 148 U.S. 503, 13 *Sup.Ct.* 728].

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MASSACHUSETTS-NEW HAMPSHIRE BOUNDARY COMPACT OF 1895

Massachusetts: 1895 New Hampshire: 1895

Congressional consent, although not formally rendered, is implied [see *Virginia* v. *Tennessee* (1893), 148 U.S. 503, 13 *Sup.Ct.* 728].

MASSACHUSETTS-NEW YORK BOUNDARY COMPACT

Massachusetts: 1853 New York: 1853 Congressional consent: 1855

MASSACHUSETTS-RHODE ISLAND BOUNDARY COMPACT

Massachusetts: 1859 Rhode Island: 1860 Congressional consent: 1861

MENOMINEE RIVER BRIDGE COMPACT

Michigan: 1927 Wisconsin: 1927 Congressional consent: 1928

MENTAL HEALTH, INTERSTATE COMPACT ON

Provides for the care and treatment of the mentally ill or mentally deficient persons and provides for interstate cooperation to pool mental health resources.

Alaska: 1959
Arkansas: 1959
Colorado: 1965
Connecticut: 1955
Delaware: 1962
Idaho: 1961
Illinois: 1965
Indiana: 1959
Iowa: 1962
Kentucky: 1958
Louisiana: 1958
Maine: 1957
Maryland: 1963
Massachusetts: 1956
Michigan: 1965
Minnesota: 1957
Missouri: 1959
New Hampshire: 1957
New Jersey: 1956
New York: 1956
North Carolina: 1959
North Dakota: 1963
Ohio: 1959
Oklahoma: 1959
Oregon: 1957
Pennsylvania: 1961
Rhode Island: 1957
South Carolina: 1959
South Dakota: 1959
Vermont: 1959
Washington: 1965
West Virginia: 1957
Wisconsin: 1966
Congressional consent: not required

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All states, U. S. territories and possessions are eligible.

Merrimack River Flood Control Compact

Provides for cooperation in flood control and water resources utilization in the Merrimack River basin and its tributaries.

Massachusetts: 1956 — New Hampshire: 1957 — Congressional consent: 1957

Michigan, Minnesota and Wisconsin Boundary Compact

Michigan: 1947 — Wisconsin: 1947 — Congressional consent: 1948
Minnesota: 1947

Middle Atlantic Interstate Forest Fire Protection Compact

Provides mutual assistance in forest fire prevention and control among compacting states and with states party to other regional forest fire protection compacts.

Delaware: 1955 — Pennsylvania: 1953 — West Virginia:
Maryland: 1956 — Virginia: — Congressional consent: 1956
New Jersey: 1955

See also the Northeastern Interstate Forest Fire Protection, South Central Interstate Forest Fire Protection and Southeastern Interstate Forest Fire Protection compacts.

Military Aid Compact

Provides for emergency mutual military aid and assistance.

Connecticut: 1953 — New York: 1951 — Vermont: 1957
Massachusetts: 1957 [12] — Pennsylvania: 1951 — Congressional consent: 1952 [13]
New Jersey: 1951

All states are eligible. The states listed have passed legislation authorizing their respective governors to enter into mutual military aid compacts. Most of these states have entered into bilateral agreements, but the details of particular adoptions are too complex to be enumerated here.

Minnesota-North Dakota Boundary Compact

Minnesota: 1961 — North Dakota: 1961 — Congressional consent: 1961

Minnesota, South Dakota and Wisconsin Boundary Jurisdiction Compact

Establishes jurisdiction over fish and game in the waters bordering these states.

Minnesota: 1917 — Wisconsin: 1933 — Congressional consent: 1921
South Dakota: 1917

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[12] In 1957 Massachusetts enacted two military aid compacts: one authorized the governor to compact with any of the other five New England states; a second authorized the governor to enter into a compact with New York.

[13] In 1956 Congress amended its original authorization by adding a new subsection which approved in advance any military aid compact(s) between New York or New Jersey and any states contiguous thereto.

MINNESOTA-SOUTH DAKOTA BOUNDARY COMPACT

Minnesota: 1939 South Dakota: 1939 Congressional consent: 1936

MINNESOTA-SOUTH DAKOTA BOUNDARY JURISDICTION COMPACT

Establishes jurisdiction over fish and game in the waters bordering these states.

Minnesota: 1917 South Dakota: 1917 Congressional consent: 1921

MINNESOTA-WISCONSIN BOUNDARY COMPACT

Mutual cession of territory and subsequent change of boundary.

Minnesota: 1917 Wisconsin: 1917 Congressional consent: 1918

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MINNESOTA-WISCONSIN BOUNDARY AREA COMPACT

Creates a boundary area commission for development of the area bordering the compacting states.

Minnesota: 1965 Wisconsin: 1965 Congressional consent: not required

MISSOURI RIVER COMPACT

Sets boundary line between Kansas and Missouri in and along the Missouri River.

Kansas: 1949 Missouri: 1949 Congressional consent: 1950

MISSOURI RIVER TOLL BRIDGE COMPACT

Authorizes the acceptance for and on behalf of the states of Kansas and Missouri of title to a toll bridge spanning the Missouri River.

Kansas: 1933 Missouri: 1933 Congressional consent: 1933

MISSOURI-TENNESSEE BRIDGE COMPACT

Establishes a commission to build a toll bridge and operate the bridge and ferries across the Mississippi River.

Missouri: 1949 Tennessee: 1949 Congressional consent: 1949

NEBRASKA-SOUTH DAKOTA BOUNDARY COMPACT OF 1897

Nebraska: 1897 South Dakota: 1897 Congressional consent: 1897

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NEBRASKA-SOUTH DAKOTA BOUNDARY COMPACT OF 1905

Nebraska: 1905 South Dakota: 1905 Congressional consent: 1905

NEW ENGLAND HEALTH SERVICES AND FACILITIES COMPACT

Creates a board to coordinate plans and programs for improvement of health services and facilities.

Connecticut: Maine: 1963 Massachusetts: New Hampshire: Rhode Island: 1963 Vermont: Congressional consent: not required

New England Higher Education Compact

Establishes a board to promote development and joint use of higher education facilities throughout the region.

Connecticut: 1955
Maine: 1955
Massachusetts: 1954
New Hampshire: 1955
Rhode Island: 1957
Vermont: 1955
Congressional consent: 1954

New England Interstate Corrections Compact

Provides for joint use of correctional facilities for confinement, treatment and rehabilitation of criminal offenders.

Connecticut: 1961
Maine: 1961
Massachusetts: 1962
New Hampshire: 1961
Rhode Island: 1960
Vermont: 1961
Congressional consent: 1934 [14]

See also the South Central Corrections and the Western Interstate Corrections compacts.

New England Interstate Water Pollution Control Compact

Establishes the New England Interstate Water Pollution Control Commission.

Connecticut: 1947
Maine: 1955
Massachusetts: 1947
New Hampshire: 1951
New York: 1949
Rhode Island: 1947
Vermont: 1949
Congressional consent: 1947

[14] This compact was consented to in advance by Congress (see the Federal Crime Control Act of 1934).

New England Welfare Compact

Permits any resident of the region to receive welfare assistance regardless of normal residence requirements.

Connecticut: 1965
Maine: 1965
Massachusetts:
New Hampshire:
Rhode Island: 1965
Vermont: 1965
Congressional consent: not required

New Hampshire-Vermont School District Compact

Establishes an interstate school district between Hanover, New Hampshire, and Norwich, Vermont.

New Hampshire: 1961
Vermont: 1963
Congressional consent: 1963

New Jersey-New York Boundary Compact

New Jersey: 1834
New York: 1834
Congressional consent: 1834

New Jersey-Pennsylvania Turnpike Bridge Compact

Provides for the construction of a bridge across the Delaware River.

New Jersey: 1951
Pennsylvania: 1951
Congressional consent: 1951

New York-Pennsylvania Boundary Compact

New York: 1886
Pennsylvania: 1887
Congressional consent: 1890

NEW YORK-RHODE ISLAND BOUNDARY COMPACT

New York: 1942 Rhode Island: 1942 Congressional consent: 1944

NEW YORK-VERMONT BOUNDARY COMPACT

New York: 1879 Vermont: 1876 Congressional consent: 1880

NORTH CAROLINA-SOUTH CAROLINA BOUNDARY COMPACT

North Carolina: 1815 South Carolina: 1815

Congressional consent, although not formally rendered, is implied [see *Virginia* v. *Tennessee* (1893), 148 U.S. 503, 13 *Sup.Ct.* 728].

NORTH CAROLINA-TENNESSEE BOUNDARY COMPACT

North Carolina: 1821 Tennessee: 1821

Congressional consent, although not formally rendered, is implied [see *Virginia* v. *Tennessee* (1893), 148 U.S. 503, 13 *Sup.Ct.* 728].

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NORTHEASTERN INTERSTATE FOREST FIRE PROTECTION COMPACT

Establishes a commission to promote effective prevention and control of forest fires among party states and with states party to other regional forest fire protection compacts.

Connecticut: 1949
Maine: 1949
Massachusetts: 1949
New Hampshire: 1949
New York: 1949
Rhode Island: 1950
Vermont: 1949
Congressional consent: 1949

This compact is open to Canadian provinces contiguous to the compacting states. See also the Middle Atlantic Forest Fire Protection, South Central Interstate Forest Fire Protection and Southeastern Interstate Forest Fire Protection compacts.

NORTHERN NEW ENGLAND MEDICAL NEEDS COMPACT

Creates Tri-State Regional Medical Needs Board to promote interstate cooperation in research and planning for medical programs and to insure day-to-day medical care in rural areas.

Maine: 1957
New Hampshire: 1957
Vermont: 1957
Congressional consent: not required

OHIO RIVER VALLEY WATER SANITATION COMPACT

Establishes a commission to control pollution of streams of the Ohio River drainage basin.

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Illinois: 1939
Indiana: 1939
Kentucky: 1940
New York: 1939
Ohio: 1939
Pennsylvania: 1945
Tennessee: 1949
Virginia: 1948
West Virginia: 1939
Congressional consent: 1940

The Tennessee adoption is conditioned upon subsequent adoptions by Alabama and North Carolina.

Oil and Gas, Interstate Compact to Conserve

Establishes a commission to promote oil and gas conservation.

Alabama: 1945
Alaska: 1957
Arizona: 1955
Arkansas: 1941
California:
Colorado: 1935
Florida: 1945
Georgia: 1946 [15]
Idaho: 1960 [15]
Illinois: 1935
Indiana: 1947
Kansas: 1935
Kentucky: 1942
Louisiana: 1941
Maryland: 1959
Michigan: 1939
Mississippi: 1948
Missouri:
Montana: 1945
Nebraska: 1953
Nevada: 1955
New Mexico: 1935
New York: 1941
North Dakota: 1953
Ohio: 1943
Oklahoma: 1935
Oregon: 1954 [15]
Pennsylvania: 1941
South Dakota: 1955
Tennessee: 1947
Texas: 1935
Utah: 1957
Virginia:
Washington: 1958 [15]
West Virginia: 1945
Wyoming: 1955
Congressional consent: 1935 [16]

All oil and gas producing states are eligible.

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[15] Associate member.

[16] This compact is unique in that renewal of Congressional approval is required quadrennially. In addition, Illinois and Kansas require that their own respective legislatures re-adopt the compact every four years.

Oregon-Washington Boundary Compact

Oregon: 1957 Washington: 1957 Congressional consent: 1958

Oregon-Washington Fisheries Compact (see Columbia River Jurisdiction Compact)

Pacific Marine Fisheries Compact

Creates a commission for the conservation of fisheries along the Pacific seaboard.

Alaska: 1962
California: 1947
Hawaii:
Idaho: 1963
Montana:
Nevada:
Oregon: 1947
Utah:
Washington: 1947
Wyoming:
Congressional consent: 1947

California, Oregon and Washington approved an amendment in 1961 opening the compact to Alaska, Hawaii or any other state having rivers or streams tributary to the Pacific Ocean. Congress consented to the amendment in 1962.

Palisades Interstate Park Compact

Provides park and recreational facilities in the Palisades area.

New Jersey: 1937 New York: 1937 Congressional consent: 1937

PAROLEES AND PROBATIONERS, INTERSTATE COMPACT FOR SUPERVISION OF

Provides for mutual assistance in crime prevention by creating cooperative procedures for supervising out-of-state parolees and probationers.

Alabama: 1939
Alaska: 1957 [17]
Arizona: 1937
Arkansas: 1937
California: 1937
Colorado: 1939 [17]
Connecticut: 1941 [17]
Delaware: 1937
Florida: 1941
Georgia: 1950
Hawaii: 1957
Idaho: 1941 [17]
Illinois: 1936
Indiana: 1935
Iowa: 1937
Kansas: 1947
Kentucky: 1948
Louisiana: 1938
Maine: 1939
Maryland: 1937
Massachusetts: 1937
Michigan: 1935
Minnesota: 1935
Mississippi: 1948
Missouri: 1945
Montana: 1937
Nebraska: 1937
Nevada: 1949
New Hampshire: 1937
New Jersey: 1936 [17]
New Mexico: 1937
New York: 1936 [17]
North Carolina: 1951
North Dakota: 1941
Ohio: 1937
Oklahoma: 1945
Oregon: 1937
Pennsylvania: 1937
Rhode Island: 1937
South Carolina: 1948
South Dakota: 1947
Tennessee: 1939
Texas: 1951
Utah: 1937 [17]
Vermont: 1937
Virginia: 1938
Washington: 1937
West Virginia: 1937
Wisconsin: 1939
Wyoming: 1939 [17]
Puerto Rico: 1957
Virgin Islands: 1959
Congressional consent: 1934 [18]

All states, U. S. territories and possessions are eligible.

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[17] Adopted the Out-of-State Incarceration amendment, on the following dates: 1951 (Connecticut, Idaho); 1953 (New Jersey, Utah); 1957 (Colorado, New York); 1959 (Wyoming); 1960 (Alaska).

[18] This compact was consented to in advance by Congress (see the Federal Crime Control Act of 1934). This Act was repealed and re-enacted in 1949 in order to shift it from Title 18 to Title 4.

PECOS RIVER COMPACT

New Mexico: 1949 Texas: 1949 Congressional consent: 1949

PENNSYLVANIA-VIRGINIA BOUNDARY COMPACT

Pennsylvania: 1779 Virginia: 1780

PISCATAQUA RIVER BRIDGE COMPACT

Creates the Maine-New Hampshire Interstate Bridge Authority to construct a bridge over the Piscataqua River.

Maine: 1937 New Hampshire: 1936 Congressional consent: 1937

PLACEMENT OF CHILDREN, INTERSTATE COMPACT ON

Establishes procedures for the interstate placement of children (either by public or private agencies) for foster care or as a preliminary to possible adoption.

Kentucky: 1966
Maine: 1961
Massachusetts: 1963
New Hampshire: 1965
New York: 1960
North Dakota: 1963
Wyoming: 1963
Congressional consent: not required

All states, U. S. territories and possessions, as well as the Government of Canada, are eligible.

Port of New York Authority

Creates the Port of New York Authority to develop transportation and terminal facilities and promote commerce in the port area.

New Jersey: 1921 New York: 1921 Congressional consent: 1921

Potomac River Compact of 1958

Establishes the Potomac River Fisheries Commission to conserve and improve fishing resources in the tidewater portion of Potomac River.

Maryland: 1959 Virginia 1958 Congressional consent: 1962

This compact is also known as Virginia-Maryland Compact of 1958; it superseded the Potomac River (Virginia-Maryland) Compact of 1785. For a brief discussion concerning the development of the 1958 compact see *The Book of the States, 1960-61,* pages 238 ff.

Potomac Valley Pollution and Conservation Compact

Creates the Interstate Commission on the Potomac River basin which has recommendatory powers concerning abatement of water pollution.

Maryland: 1939
Pennsylvania: 1943
Virginia: 1940
West Virginia: 1941
District of Columbia: 1940
Congressional consent: 1940

Pymatuning Lake Compact

Provides for uniform administration of recreational and park facilities in the lake area.

Ohio: 1937 Pennsylvania: 1937 Congressional consent: 1937

In 1945 both states and Congress agreed to an amendment permitting use of boats on Pymatuning Lake equipped with motors not exceeding a 6 HP rating. A second amendment (Pennsylvania, 1959; Ohio, 1961; Congressional consent, 1961) restricted motor boats to a specified area of the lake. A third amendment, approved by both states in 1963 and Congress in 1964, increased from 6 HP to 10 HP the maximum rating of motor boats permitted to operate on the lake.

Red River of the North Compact

Minnesota: 1937
North Dakota: 1937
South Dakota: 1937
Congressional consent: 1938

This is also known as the Tri-State Water Compact.

Republican River Compact

Creates a commission to apportion the waters of the Republican River basin.

Colorado: 1943
Kansas: 1943
Nebraska: 1943
Congressional consent: 1943

An earlier proposal was adopted and repealed, respectively, by all states in 1941 and 1943. The 1941 proposal was approved by Congress but vetoed by the President.

RIO GRANDE INTERSTATE COMPACT

Apportions the waters of the Rio Grande.

Colorado: 1939 Texas: 1939 Congressional consent: 1939
New Mexico: 1939

This compact replaces a temporary compact of 1929.

SABINE RIVER COMPACT

Creates the Sabine River Compact Administration to apportion the waters of the Sabine River.

Louisiana: 1954 Texas: 1953 Congressional consent: 1954

SAVANNAH RIVER COMPACT

Establishes agreement on boundary and navigation on the Savannah River.

Georgia: 1788 South Carolina: 1788

Congressional consent, although not formally rendered, is implied [see *Virginia* v. *Tennessee* (1893), 148 U.S. 503, 13 *Sup.Ct.* 728].

SCHOOL DISTRICT COMPACT, INTERSTATE

Authorizes establishing and operating interstate public school districts.

Illinois: 1955 Wisconsin: 1955 Congressional consent: 1956

This is also known as the Interstate Compact on Public School Administration. This compact authorizes agreements with adjacent states which have adopted the compact and does not become effective until such agreements have been executed.

SNAKE RIVER COMPACT

Apportions the waters of the Snake River.

Idaho: 1950 Wyoming: 1950 Congressional consent: 1950

SOUTH CENTRAL CORRECTIONS COMPACT

Creates the South Central Interstate Corrections Board to arrange for out-of-state use of correctional institutions for women prisoners.

Alabama:	Kentucky:	Oklahoma:
Arkansas: 1957	Louisiana:	Tennessee: 1955
Florida:	Mississippi:	Texas:
Georgia:	Missouri:	Congressional consent:
Kansas:		1934 [19]

See also the New England Interstate Corrections and the Western Interstate Corrections compacts.

---

[19] This compact was consented to in advance by Congress (see the Federal Crime Control Act of 1934). This Act was repealed and re-enacted in 1949 in order to shift it from Title 18 to Title 4.

South Central Interstate Forest Fire Protection Compact

Provides mutual aid in forest fire prevention and control among party states and with states party to other regional forest fire prevention compacts.

Arkansas: 1953
Louisiana: 1954
Mississippi: 1954
Oklahoma: 1953
Texas: 1955
Congressional consent: 1954

See also the Middle Atlantic Interstate Forest Fire Protection, Northeastern Interstate Forest Fire Protection and the Southeastern Interstate Forest Fire Protection compacts.

South Platte River Compact

Apportions waters of South Platte River.

Colorado: 1925
Nebraska: 1923
Congressional consent: 1926

Southeastern Interstate Forest Fire Protection Compact

Provides mutual aid in forest fire prevention and control among party states and with states party to other regional forest fire prevention compacts.

Alabama: 1955
Florida: 1955
Georgia: 1953
Kentucky: 1954
Mississippi: 1954
North Carolina: 1953
South Carolina: 1954
Tennessee: 1955
Virginia: 1956
West Virginia: 1955
Congressional consent: 1954

See also the Middle Atlantic Forest Fire Protection, Northeastern Interstate Forest Fire Protection and the South Central Interstate Forest Fire Protection compacts.

Southern Interstate Nuclear Compact

Creates the Southern Interstate Nuclear Board and provides for regional cooperation in the development of nuclear energy for peacetime purposes.

Alabama: 1961
Arkansas: 1961
Delaware: 1966
Florida: 1961
Georgia: 1962
Kentucky: 1960
Louisiana: 1960
Maryland: 1963
Mississippi: 1962
Missouri: 1963
North Carolina: 1965
Oklahoma: 1965
South Carolina: 1961
Tennessee: 1961
Texas: 1961
Virginia: 1962
West Virginia: 1964
Congressional consent: 1962

States originally party to the compact approved extending membership to the state of Missouri.

Southern Regional Education Compact

Establishes the Southern Regional Education Board to promote development and joint use of higher education facilities throughout the region.

Alabama: 1949
Arkansas: 1957
Delaware:
Florida: 1949
Georgia: 1949
Kentucky: 1950
Louisiana: 1948
Maryland: 1949
Mississippi: 1948
North Carolina: 1949
Oklahoma: 1949
South Carolina: 1948
Tennessee: 1949
Texas: 1951
Virginia: 1950
West Virginia: 1956
Congressional consent: not required

Arkansas originally joined in 1949; the legislature subsequently repealed its action, but the state rejoined in 1957. In the mid-fifties the compact was expanded to permit Delaware and West Virginia to join. Delaware adopted the compact in 1955 but withdrew in 1965. The by-laws were amended in the late fifties to expand the membership of the board.

Taxation of Motor Fuels Consumed by Interstate Buses, Compact on

Provides for sharing of taxes on motor fuels consumed by interstate buses and establishes consumption of fuel within the state as the criterion for taxation by each of the party states.

Maine: 1963
Maryland: 1964
Massachusetts: 1963
New Hampshire: 1963
Pennsylvania: 1963
District of Columbia: 1965
Congressional consent: 1965 [20]

All states, U. S. territories and possessions, Canadian provinces and states of Mexico are eligible.

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Tennessee River Basin Water Pollution Control Compact

Creates a commission to promote control and reduction of pollution in waters of the Tennessee River basin.

Alabama:
Georgia:
Kentucky: 1958
Mississippi: 1956
North Carolina:
Tennessee: 1955
Virginia:
Congressional consent: 1958

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[20] For all states and the District of Columbia, Congressional consent was given in 1965. Individual Congressional consent action is required for all states adopting this compact.

Tennessee-Virginia Boundary Compact of 1803

Tennessee: 1803
Virginia: 1803

Congressional consent, although not formally rendered, is implied [see *Virginia* v. *Tennessee* (1893), 148 U.S. 503, 13 *Sup.Ct.* 728].

Tennessee-Virginia Boundary Compact of 1901

Tennessee: 1901
Virginia: 1901
Congressional consent: 1901

Thames River Flood Control Compact

Creates a commission to promote cooperation in flood control and use of the water resources in the Thames River basin.

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Connecticut: 1957
Massachusetts: 1957
Congressional consent: 1958

Tombigbee-Tennessee Waterway Development Compact

Creates Tennessee-Tombigbee Waterway Development Authority to promote development of a navigable waterway connecting the Tennessee and Tombigbee rivers.

Alabama: 1957
Kentucky: 1962
Mississippi: 1958
Tennessee: 1959
Congressional consent: 1958

Tennessee and Kentucky joined the compact, in accordance with provisions of the compact permitting any state(s) contiguous to Alabama and Mississippi to enter the compact upon approval of the latter states.

Tri-State Compact

Establishes the Interstate Sanitation Commission to control and abate water pollution.

Connecticut: 1941
New Jersey: 1935
New York: 1936
Congressional consent: 1935

This is also known as the Interstate Sanitation Compact. In 1955 New Jersey adopted an amendment authorizing the commission to undertake study of air pollution in the New York metropolitan area. New York and Congress accepted the amendment in 1956.

Tri-State Transportation Compact

Creates a transportation planning commission for the tri-state metropolitan area.

Connecticut: 1965
New Jersey: 1965
New York: 1965
Congressional consent: 1961

The commission includes representatives of local governments. This compact replaces the 1959 New Jersey-New York Transportation Agency Compact (see Appendix II).

Tri-State Water Compact (see Red River of the North Compact)

Uniform Motor Vehicle Registration Proration and Reciprocity Agreement

Provides for proration of motor vehicle registration fees.

Arizona: 1964
California: 1955
Colorado: 1955
Idaho: 1955
Illinois: 1962
Iowa: 1960
Kansas: 1956
Missouri: 1959
Montana: 1955
Nebraska: 1960
Nevada: 1955
New Mexico: 1955
North Dakota: 1960
Oregon: 1955
South Dakota: 1961
Washington: 1955
British Columbia: 1961
Congressional consent: not required

All states, U. S. territories and possessions are eligible.

Upper Colorado River Basin Compact

Creates a commission to apportion the waters of the Upper Colorado River basin.

Arizona: 1949
Colorado: 1949
New Mexico: 1949
Utah: 1949
Wyoming: 1949
Congressional consent: 1949

Vehicle Equipment Safety Compact

Promotes uniformity in state laws relating to motor vehicle equipment.

Arizona: 1964
Arkansas: 1965
California: 1963
Colorado: 1963
Connecticut: 1965
Delaware: 1963
Florida: 1963
Georgia: 1964
Idaho: 1963
Illinois: 1963
Indiana: 1965
Iowa: 1965
Kansas: 1963
Kentucky: 1964
Louisiana: 1964
Maine: 1963
Maryland: 1965
Massachusetts: 1963
Michigan: 1963
Minnesota: 1965
Missouri: 1965
Montana: 1965
Nebraska: 1963
Nevada: 1963
New Hampshire: 1963
New Jersey: 1964
New Mexico: 1963
New York: 1962
North Carolina: 1963
North Dakota: 1965
Ohio: 1963
Oklahoma: 1965
Oregon: 1963
Pennsylvania: 1963
Rhode Island: 1963
South Dakota: 1965
Tennessee: 1965
Texas: 1963
Utah: 1963
Vermont: 1963
Virginia: 1964
Washington: 1963
Wisconsin: 1965
Wyoming: 1963
District of Columbia: 1963
Congressional consent: 1958 [21]

All states, U. S. territories and possessions, Canadian provinces and states of Mexico are eligible.

Virginia-Maryland Compact of 1958 (see Potomac River Compact of 1958)

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[21] This compact was consented to in advance by Congress (see the Federal Highway Safety Act of 1958).

Virginia-West Virginia Boundary Compact of 1863

Relates to the cessation of certain counties to the new state of West Virginia.

Virginia: 1863 West Virginia: 1863 Congressional consent: 1866

The Virginia repeal of the cession (*sic*) acts were ruled ineffective to terminate a compact concluded with congressional assent [*Virginia* v. *West Virginia* (1870), U.S. 11 *Wall.* 39].

Virginia-West Virginia Boundary Compact of 1959

Virginia: 1959 West Virginia: 1959 Congressional consent: 1959

Wabash Valley Compact

Sets up a commission as a planning agency for the Wabash Valley basin.

Ilinois: 1959 Indiana: 1959 Congressional consent: 1959

Washington Metropolitan Area Mass Transit Authority Compact

Creates the Washington Metropolitan Area Transit Authority to plan and develop improved transit facilities in the District of Columbia area; coordinates the operation of public and privately owned or controlled transit facilities.

Maryland: 1965
Virginia: 1966
District of Columbia: 1966
Congressional consent: 1966

This compact was created by amending the Washington Metropolitan Area Transit Regulation Compact by adding thereto Title III, the Washington Metropolitan Area Transit Authority Compact. Congress consented to the compact on behalf of the District of Columbia.

Washington Metropolitan Area Transit Regulation Compact

Creates a commission to regulate and improve transit in the area comprising the District of Columbia and adjacent sections of Maryland and Virginia.

Maryland: 1959 District of Columbia: 1960 Congressional consent: 1960
Virginia: 1958

This was amended by both states and Congress in 1962 to include within the Washington Metropolitan Area Transit District the Dulles International Airport and all cities which lie within the metropolitan district, to clarify the commission's jurisdiction over interstate taxicab operations, to provide that the annual report of the commission be submitted on a fiscal year basis, to exempt from the commission's jurisdiction transportation performed by a carrier whose only routes are between points outside the metropolitan district and points within the metropolitan district. In 1963 and 1964, respectively, Maryland and Virginia adopted a second amendment relating to household goods movers and the issuance of permits by a committee to be named by the Washington Metropolitan Area Transit Commission. This amendment has not yet been presented to Congress for consent.

Waterfront Compact

Establishes a joint Waterfront Commission of New York harbor to improve labor conditions in the port district.

New Jersey: 1953 New York: 1953 Congressional consent: 1953

This was amended by both states in 1957 to strengthen the regulatory powers of the commission. Congressional consent was not required.

Welfare Services, Interstate Compact on

Provides welfare services on a reciprocal basis and eliminates barriers of restrictive residence or settlement requirements.

Connecticut: 1961 Maine: 1959 Congressional consent: not required

All states, U. S. territories and possessions are eligible. A modified version of this compact, the Interstate Welfare Compact, was approved at the 1959 annual meeting of the National Governors' Conference. No state has enacted this modified version.

Western Interstate Corrections Compact

Provides for joint use of correctional facilities.

Alaska: 1961
Arizona:
California: 1961
Colorado: 1959
Hawaii: 1965
Idaho: 1959
Kansas:
Montana: 1959
Nebraska:
Nevada: 1959
New Mexico: 1959
North Dakota:
Oklahoma:
Oregon: 1959
South Dakota:
Texas:
Utah: 1959
Washington: 1959
Wyoming: 1959
Guam: 1960
Congressional consent: 1934[22]

States outside the region but contiguous to the western states are also eligible.

---

[22] This compact was consented to in advance by Congress (see the Federal Crime Control Act of 1934). This Act was repealed and re-enacted in 1949 in order to shift it from Title 18 to Title 4.

Western Regional Education Compact

Establishes a commission to promote development and joint use of higher education facilities throughout the region.

Alaska: 1955
Arizona: 1952
California: 1955
Colorado: 1951
Hawaii: 1959
Idaho: 1953
Montana: 1951
Nevada: 1959
New Mexico: 1951
Oregon: 1951
Utah: 1951
Washington: 1955
Wyoming: 1953
Congressional consent: 1953

Yellowstone River Compact

Apportions the waters of the Yellowstone River.

Montana: 1951
North Dakota: 1951
Wyoming: 1951
Congressional consent: 1951

SUPPLEMENT C

COMPACTS IN OPERATION IN 1966 WHICH HAD NOT RECEIVED THE CONSENT OF CONGRESS

Compact for Education
Interpleader Compact
Interstate Compact on Juveniles
Interstate Library Compact
Interstate Compact on Mental Health
Minnesota-Wisconsin Boundary Area Compact
New England Health Services and Facilities Compact
New England Welfare Compact
Northern New England Medical Needs Compact
Interstate Compact on Placement of Children
Southern Regional Education Compact
Uniform Motor Vehicle Registration Proration and Reciprocity Agreement
Interstate Compact on Welfare Services

These compacts are described in the alphabetical compilation of compacts included in Supplement B, above, at pp. 71-120.

Supreme Court, U. S.
FILED
JUL 9 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1976

No. 76-635

UNITED STATES STEEL CORPORATION, et al., on behalf of themselves and all persons similarly situated,

Appellants,

vs.

MULTISTATE TAX COMMISSION, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLEES

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1976

No. 76-635

UNITED STATES STEEL CORPORATION, et al.,
on behalf of themselves and all persons
similarly situated,

Appellants,

vs.

MULTISTATE TAX COMMISSION, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

BRIEF OF APPELLEES

QUESTIONS PRESENTED

1. Is the Multistate Tax Compact invalid on its face under Section 10, Article I of the Constitution of the United States and should its Commission be disbanded because the Compact has not been consented to by Congress?

2. Does the Compact impose an unreasonable burden on or discriminate against interstate commerce in violation of Section 8 of Article I of the Constitution of the United States?

3. Does the Compact deny multistate taxpayers due process and equal protection of the laws in violation of the Fourteenth Amendment of the U.S. Constitution?

STATEMENT OF THE CASE

Appellants' "Statement" of the case is inaccurate, incomplete, misleading and contains numerous statements and opinion not supported by the record.

This action involves the validity of the Multistate Tax Compact (hereinafter referred to as the "Compact") on its face. In their Amended Complaint (A. 2-10), the Appellants asserted that the Compact violates certain provisions of the United States Constitution and sought declaratory and injunctive relief against its enforcement. They asked that the Compact be declared invalid on its face and that its governing body, the Multistate Tax Commission, be disbanded (A. 9-10). The Appellees, asserting that only questions of law were involved, moved for a summary judgment and requested that the motion be heard by a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 (A. 20-22).

As required by local court rule 9(g), in support of Appellees' motion for summary judgment, Appellees filed a "Statement Under Rule 9(g)" (A. 23-37), supported by the Affidavit of Eugene Corrigan, Executive Director of the Multistate Tax Commission (A. 38-41) and a copy of the Compact as enacted by the State of Washington which is typical of the Compact enacted by all member states (Jur. St. App. E. 54a-79a, A. 42).

There is no dispute as to any material fact in this cause including the facts in the 9(g) statement and the Corrigan affidavit (A. 43).

The Multistate Tax Commission (hereinafter referred to as the "Commission") is the administrative agency for the Compact and is created by Article VI of the Compact (A. 33). The members of the Commission are the tax administrators of the member states (A. 34). It is undisputed (and indisputable) that:

1. Neither the Commission nor the members thereof acting in concert have any power to levy taxes, to specify a tax base, to fix tax rates, or to collect taxes from any of the appellants or any other person whatsoever (A. 34; Jur. St. App. A. 11a).

2. Individual member states of the Compact retain exclusive control over any and all legislation or administrative actions including (i) the rate of tax; (ii) what is included in any tax base, such as what constitutes taxable income or lawful deductions therefrom for income tax purposes; and (iii) the means and methods of determining any tax liability and of collecting any taxes which may be determined to be due any such member state, whether or not the Commission has conducted a joint audit of any taxpayer on behalf of such member state (A. 36; Jur. St. App. A. 11a-12a).

3. The conduct of a joint audit by the Commission on behalf of member states or subdivisions

thereof is at the sole discretion and option of each member state or subdivision thereof. In the event that a member state or subdivision thereof desires to participate in a joint audit of any multistate taxpayer by the Commission, such member state or subdivision thereof may request the Commission to perform the audit on its behalf and in such case the Commission may conduct such audit in accordance with the provisions of Article VIII of the Compact (A. 34-35; Jur. St. App. A. 11a).

4. Any grievance that a taxpayer may have with the results of a Commission audit or the tax liability resulting therefrom is justiciable in the taxing state in accordance with the same procedures governing the grievances of intrastate taxpayers (Jur. St. App. A. 12a).

5. Any uniform rules, regulations or forms adopted by the Commission are advisory only to the member states and have no binding effect on any member state or any taxpayer whatsoever. Each member state of the Commission has the right and power to reject *in toto*, disregard, amend, or modify any rules, regulations or forms of the Commission; and the rules and regulations or forms of the Commission have no force and effect in any member state unless adopted by such member state in accordance with that state's own laws and procedures for the adoption of rules and regulations or forms (A. 36; Jur. St. App. A. 11a). If so adopted, they become the rules, regulations and forms of the adopting state.

6. The laws with respect to the maintenance of

records by multistate taxpayers are the laws of the individual member states and the Commission has no power to direct any multistate taxpayer to keep or maintain any particular records (A. 35).

Congress, other than by enactment of minimal jurisdictional standards under Public Law 86-272, has not enacted any statute which in any way regulates or controls the levying and collection of income taxes, sales taxes, use taxes, capital stock taxes or gross receipts taxes by any state or its political subdivision as pertains to the Appellants or corporations similarly situated (A. 36-37; Jur. St. App. A. 12a-13a).

After analyzing the constitutional issues in light of the undisputed facts, the three-judge court below held:

> "* * * we find the Compact to be lawful, and the Compact's creation, the Commission, to be a lawfully constituted body." (Jur. St. App. A. 20a)

The court based its holding upon the following findings:

1. There is no material issue of fact in dispute. (Jur. St., App. A. 3a).

2. The Compact does not tend to increase the political power of the member states or encroach upon or interfere with federal supremacy and therefore does not violate the Compact Clause (Jur. St. App. A. 11a, 12a).

3. The Compact does not unreasonably burden or discriminate against interstate commerce (Jur. St. App. A. 14a, 15a, 20a).

4. The Compact does not deny Appellants equal protection or due process of law (Jur. St. App. A. 20a).

5. The Compact does not subject Appellants to unreasonable searches and seizures (Jur. St. App. A. 20a, 21a).

The Appellants' argument on appeal is confined almost exclusively to the congressional consent question. As to this question, they abandon any consideration of the Compact provisions. They refer to none of them in their argument, but rely instead on conclusionary statements of their own choosing, which are not supported by the record and are concerned with wholly irrelevant matters.

While in their statement of the case, Appellants attribute various "powers" to the Commission, they fail to inform the Court that the Commission functions only as an advisory agency and that its work product is not binding on anyone—State or taxpayer. It is misleading for the Appellants to label the Commission an independent body and to endow it with various powers when it is really only an advisory agency of the member states. The Appellees that are the individual administrators of their own tax laws deny that they have surrendered to the Commission any of their powers to fix and determine the tax liabilities of any taxpayers. It is clear that under the Compact the member states have not surrendered any of their powers.

At this juncture it is important to examine the

Compact language to see what it does and does not do.[1] It contains twelve Articles.

Article I of the Compact states the purposes of the Compact are to:

> "1. Facilitate proper determination of state and local tax liability of multistate taxpayers, including equitable apportionment of tax bases and settlement of apportionment disputes;
> "2. Promote unformity or compatibility in significant components of tax systems;
> "3. Facilitate taxpayer convenience and compliance in the filing of tax returns and other phases of tax administration;
> "4. Avoid duplicate taxation."

It contains no grant of power to the Commission or its executive director.

Article II contains various definitions and has no operative effect apart from other provisions of the Compact.

Article III, § 1 and Article IV allow interstate taxpayers an option to (i) divide their income in accordance with the provisions of the Uniform Division of Income for Tax Purposes Act (UDITPA) promulgated by the National Conference of Commissioners on Uniform State Laws (see Volume 9a, Uniform Laws Annotated, p. 448) or (ii) in accordance with otherwise applicable state law. Clearly, any state may independently, apart from any compact, provide an interstate taxpayer with this same option. In states, such as Michigan and Montana, which in-

[1]The District Court set forth a proper analysis of the provisions of the Compact (Jur. St. App. A. 5a-9a). Those provisions are also analyzed in the Rule 9(g) Statement of the Appellees (A. 25-33). The full text of the Compact is contained in Jur. St. App. E. 54a-79a.

corporate UDITPA in their income tax laws, it has no practical force or effect.

Article III, § 2 allows another option to interstate taxpayers. It provides that each party state or any subdivision thereof which imposes an income tax must allow a taxpayer meeting certain requirements to file a short form and to compute income tax liability simply on the basis of a percentage of sales volume within the state. Again like Article III, § 1 and Article IV, this option is essentially a uniform act and could be adopted by any state independently of any compact even though it has been specifically devised for the Compact. *Neither Article III nor Article IV grants any power to the Commission or to its Executive Director.*

Article V adopts certain substantive provisions relating to sales and use tax laws. Again, the provisions of this article are essentially a uniform act which could have been adopted independently of any Compact. Those provisions do not grant any powers to the Commission or to its Executive Director.

Article VI pertains to the Commission's operations. Sections 1, 2 and 4 involve the creation and internal management of the Commission.

Section 1 provides for membership on the Commission, voting rights, meetings, personnel, offices, adoption of bylaws, etc. The Commission is composed of one member from each party state who is the head of the state agency charged with the administration of the types of taxes to which the Compact applies. Alternates and nonvoting representation are pro-

vided for. An executive director is provided for and he is given the power to appoint and discharge personnel "irrespective of the civil service, personnel or other merit system laws of party states." This is a matter that does not rise to constitutional proportions nor does it concern Appellants or any other taxpayer.

Section 2 provides for an executive committee to function according to the bylaws and empowers the Commission to create advisory and technical committees, membership on which may include any private individuals and public officials.

Section 4 is concerned with the finances of the Commission.

Section 3, the "powers" provision, generally covers the fields of research, dissemination of information, and proposal of recommendations. It reads:

> "In addition to powers conferred elsewhere in this compact, the commission shall have power to:
> (a) Study state and local tax systems and particular types of state and local taxes.
> (b) Develop and recommend proposals for an increase in uniformity or compatibility of state and local tax laws with a view toward encouraging the simplification and improvement of state and local tax law and administration.
> (c) Compile and publish information as in its judgment would assist the party states in implementation of the compact and taxpayers in complying with state and local tax laws.
> (d) Do all things necessary and incidental to the administration of its functions pursuant to this compact."

These "powers" do not include anything that have any compulsory effect on the states or taxpayers. They are merely powers to advise and to make recommendations to the party states. Any association of the states could perform the same function.

Article VII provides that the Commission may adopt uniform regulations and forms for the administration of various types of taxes in the party states when such taxes involve uniform or similar provisions of laws among the party states. This article also provides for certain procedures necessary for the adoption of any regulations and forms by the Commission. Section 3 provides that such uniform regulations *to be legally effective must be adopted by the individual states, in accordance with their own laws and procedures for the adoption of regulations.* Thus, the Commission's function under Article VII is to make recommendations only. This function could be performed by groups such as the National Association of Tax Administrators, the Council of State Governments, the Conference of Commissioners on Uniform State Tax Laws, the American Bar Association or by any ad hoc group of tax administrators or even any individual or entity whatsoever. The only regulations the Commission has adopted are those pertaining to Article IV of the Compact.[2]

Article VIII pertains to joint audits and by its

[2]These regulations were adopted on February 21, 1973. They are set out as Appendix J, pp. 64-84 of the Seventh Annual Report of the Multistate Tax Commission. Contrary to Appellants' argument, these regulations distinguish between business and nonbusiness income and provide for the specific allocation of non-business income. See *infra*, pages 64-68 for a fuller discussion of this subject matter.

provisions is in force only in those party states that specifically provide therefor by state statute. Section 2 of Article VIII permits a party state or subdivision thereof to request the Commission to perform an audit on its behalf. It further provides that in responding to a request of a party state the Commission "shall have access to and may examine, at any reasonable time, such accounts, books, papers, records, and other documents and any relevant property or stock of merchandise" of any taxpayer subject to the joint audit. *The Commission merely acts pursuant to such request as an agent of the requesting party states and in conformity with the laws of the requesting party states.*

Section 3 of Article VIII provides that the Commission may require the attendance of any person within the state where it is conducting an audit for purpose of giving testimony with respect to any account, book, paper, document, or other record, property or stock of merchandise being examined in connection with the audit. It further provides that if the person is not within such state he may be required to attend for such a purpose within the state of which he is a resident provided that state has adopted Article VIII of the Compact.

Section 4 of Article VIII provides that:

"The Commission may apply to any court having the power to issue compulsory process for orders in aid of its powers and responsibilities pursuant to this Article and any and all such courts shall have jurisdiction to issue such orders. Failure of any person to obey any such order

> shall be punishable as contempt of the issuing court. If the party or subject matter on account of which the commission seeks an order is within the jurisdiction of the court to which application is made, such application may be to a court in the state or subdivision on behalf of which the audit is being made or a court in the state in which the object of the order being sought is situated. The provisions of this paragraph apply only to courts in states that have adopted this article."

Section 5 of Article VIII gives the Commission the power to decline to perform any audit requested if it finds that its available personnel or other resources are insufficient for the purpose or that in the terms requested the audit is impracticable of satisfactory performance. It further provides that:

> "If the commission, on the basis of its experience, has reason to believe that an audit of the particular taxpayer, * * * would be of interest to a number of party states or their subdivisions, it may offer to make the audit or audits, the offer to be contingent on sufficient participation therein as determined by the commission."

Section 6 of Article VIII contains the confidentiality provision and provides:

> "Information obtained by any audit pursuant to this article shall be confidential and available only for tax purposes to party states, their subdivisions, or the United States. Availability of information shall be in accordance with the laws of the states or subdivisions on whose account the commission performs the audit, and only through the appropriate agencies or officers of such states or subdivisions. Nothing in this article shall be construed to require any taxpayer to keep records for any period not otherwise required by law."

Section 7 of Article VIII reads:

> "Other arrangements made or authorized pursuant to law for cooperative audit by or on behalf of the party states or of any of their subdivisions are not superseded or invalidated by this article."

Section 8 of Article VIII prohibits the Commission from making any charges for an audit against any taxpayer.

The power of the Commission pursuant to Article VIII is simply to gather audit information from the taxpayer subject to a joint audit and to turn this information over to the respective states requesting the joint audit for what use they wish to make of it. It is no different from the power possessed by individual state tax administrators to require the disclosure of facts necessary for audit purposes.

Article IX pertains to arbitration. Section 3 of Article IX gives the taxpayer an option to submit certain apportionment or allocation disputes to an arbitration panel. Section 1 specifically provides that "whenever the commission finds a need for settling disputes concerning apportionments and allocations by arbitration, it may adopt a regulation placing this article in effect * * *" This article is not in effect at the present time.

Article X, § 1 provides that the Compact shall enter into force when enacted into law by any seven states. Section 2 of Article X permits a party state to withdraw from the Compact by enacting a statute

repealing the same and further provides that withdrawals shall not affect any liability already incurred by or chargeable to a party state prior to the time of withdrawal. Section 3 of Article X preserves proceedings commenced before an arbitration board prior to withdrawal.

Article XI provides:

> "Nothing in this compact shall be construed to:
> (a) Affect the power of any state or subdivision thereof to fix rates of taxation, except that a party state shall be obligated to implement Article III, § 2 of this compact.*
> (b) Apply to any tax or fixed fee imposed for the registration of a motor vehicle or any other tax on motor fuel, other than a sales tax: PROVIDED, That the definition of 'tax' in Article VIII 9 may apply for the purposes of that article and the commission's power of studying recommendations pursuant to Article IV 3 may apply.
> (c) Withdraw or limited jurisdiction of any state or local court or administrative officer or body with respect to any person, corporation, or other entity or subject matter, except to the extent that such jurisdiction is expressly conferred by or pursuant to this compact upon another agency or body.
> (d) Supersede or limit the jurisdiction of any court of the United States."

The implementation of Article III, § 2 of the Compact is up to the legislature of the respective states and the Commission has no power concerning the same.

Article XII states that the Compact shall be liberally construed so as to effectuate the purposes thereof and further provides:

> "The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any state or the United States or the applicability thereof to any government agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government agency, person or circumstance shall not be affected thereby. * * *"

An examination of the provisions of the Compact thus indicates that it is a package of arrangements which traditionally have been used, independently of any formal compact, to further interstate uniformity and cooperation, such as uniform or reciprocal acts. It creates a body of state tax officials to make advisory recommendations with respect to statutory or administrative changes. All of these things recommended by the Commission may be put into operation only by the individual states themselves, acting either through their legislatures or their individual tax administrators.

The only question really argued by Appellants in this case is whether such a Compact requires congressional consent within the purview of the decisions of this Court which have interpreted the scope of the compact clause (Section 10, Article I, Clause 3, Constitution of the United States).

SUMMARY OF ARGUMENT

I

The basic question on appeal is whether the

* (This allows certain taxpayers to elect, at their option, certain procedures.)

Compact requires congressional consent. This is resolved by an examination of the provisions of the Compact and determining which of those provisions, if any, require congressional consent before they can be placed in operation by the member states. This poses only a question of law (Jur. St. App. A. 3a).

In *Virginia v. Tennessee*, 148 U.S. 503 (1893), this court determined that only those compacts or agreements which shifted political power among the states in a manner which tended to encroach upon or interfere with federal supremacy required congressional consent. The *Virginia v. Tennessee* interpretation of the compact clause has been universally followed since its pronouncement in 1893 and was recently reaffirmed by this court in *New Hampshire v. Maine*, 426 U.S. 363 (1976). It is not dicta and has not been limited to the settlement of boundary disputes. Furthermore, the *Virginia v. Tennessee* test is consistent with the purpose of the compact clause. It protects federal supremacy and at the same time permits the states the freedom to deal with their own affairs without the control of Congress. It represents a reasonable balance between states' rights and federal supremacy in our federal system. It should be followed by this court in determining the validity of the Compact.

Application of the *Virginia v. Tennessee* test to the Compact clearly reveals that it is not the type of "compact or agreement" which requires congressional consent. The Compact does not involve any

shift of political power among the states and it does not encroach upon any area of federal supremacy. It consists solely of uniform laws, an advisory mechanism for the uniform interpretation and application of those laws, and an advisory mechanism for otherwise developing uniformity and compatibility in state and local taxation of multistate businesses.

The Compact has nothing to do with the subject matter of worldwide combined reporting, and even if it did, it could not interfere with the national interest and the conduct of foreign affairs. Any international treaty or agreement of the United States concerning any subject matter dealt with by the Compact would override the Compact provisions under the supremacy clause and leave the federal government free to deal with foreign affairs as it sees fit. Furthermore, there is nothing in the Compact that interferes with the sovereignty and revenue policies of nonmember states.

Thus, the *Virginia v. Tennessee* test as affirmed by this court in *New Hampshire v. Maine*, *supra*, upholds the validity of the Compact without congressional consent. Contrary to Appellants' argument, this case does not involve the question of whether or not the Compact is being administered properly. Appellants ask in their Complaint that the Compact be declared invalid on its face (A. 9) and do not contend that it "is being administered other than according to its terms. * * *" (Jur. St. App. A. 3a).

II

The Compact is not unconstitutional since it has no real impact on interstate commerce. The enactment of uniform legislation by the member states in an area not acted on by Congress and provision for uniform administration of such legislation by the advisory function of the Commission does not interfere with Congress' power to regulate interstate commerce or place an unconstitutional burden on interstate commerce (Jur. St. App. A. 13a-20a).

"There is nothing inherent in the problems of multistate tax administration that would require federal regulation; nor has Congress yet identified these problems as a matter of peculiar federal concern." (Jur. St. App. A. 13a) "The fact that the Compact might promote a consensus among party states on principles of allocation of revenues or other matters does not create an impermissible burden upon interstate commerce." (Jur. St. App. A. 14a)

III

The classifications employed in the Compact applicable to Appellants and other multistate taxpayers "is a permissible legislative response to what is perceived as the different circumstances of the multistate taxpayer", (Jur. St. App. A. 20a) and does not deny Appellants equal protection or due process of law (Jur. St. App. A. 15a-20a).

IV

In arguing that the Compact requires congressional consent, Appellants have pointed to no pro-

vision of the Compact which requires congressional consent and ignore the test laid down by this court in *Virginia v. Tennessee*, *supra*, and which was established as controlling precedent by this court in *Wharton v. Wise*, 153 U.S. 155 (1894) and *New Hampshire v. Maine*, *supra*. Rather, Appellants rely on other tests of their own choosing and on what they claim is maladministration of the Compact. In support of this argument, Appellants rely on matters (1) which are without the record in this cause; (2) which are irrelevant and immaterial; (3) which have nothing to do with the administration of the Compact by the Commission; and (4) which are contrary to fact or are merely speculative. Since administration of the Compact is not the question at issue, Appellants' argument should be disregarded by this court. Furthermore, even if the Compact were being administered improperly, the Appellants would have ample remedies under state law to correct any errors that affect any of their legal rights. Appellants are not champions of any rights of nonmember states or the federal government.

Appellants' arguments were fully discussed and answered by the lower court and its judgment should be affirmed by this court.

THE ARGUMENT

I

UNDER THE COMPACT CLAUSE, ONLY THOSE AGREEMENTS OR COMPACTS WHICH TEND TO INCREASE THE POLITICAL POWER OF THE STATES IN A MANNER THAT ENCROACHES ON THE FEDERAL SUPREMACY REQUIRE CONGRESSIONAL CONSENT AND THE COMPACT IN QUESTION IS NOT SUCH AN AGREEMENT OR COMPACT.

A. The standard to determine the need for congressional consent to a compact or an agreement between states is whether it tends to increase the political power of the states in a manner which may encroach upon the just supremacy of the United States.

The issue of whether or not the Compact is invalid for lack of congressional consent involves an interpretation of Article I, § 10, clause 3 of the United States Constitution, which reads in material part:

> "No State shall, without the Consent of the Congress * * * enter into any Agreement or Compact with another State, or with a foreign power * * *"

This language was interpreted in the early case of *Virginia v. Tennessee*, 148 U.S. 503 (1893) as follows:

> "Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." (148 U.S. 519)

This interpretation was reaffirmed as the controlling test in *New Hampshire v. Maine*, *supra*, 426 U.S. 363 (1976), and has been quoted with approval in *Wharton v. Wise*, *supra*, 153 U.S. 155 (1894); *Sterns v. Minnesota ex rel. Marr*, 179 U.S. 223 (1900); and *Louisiana v. Texas*, 176 U.S. 1 (1900).

In *New Hampshire v. Maine*, *supra*, this Court affirmed the *Virginia v. Tennessee* test as follows:

> "New Hampshire suggests, however, that acceptance of the consent decree without an independent determination by the Court as to the validity of the legal principles on which it is based would be a circumvention of the Compact Clause, Art. I, § 10, cl. 3. The premise of this argument is that the proposed settlement is an "Agreement or Compact" within the meaning of the Clause and thus requires the consent of Congress to be effective. We disagree.
>
> "The application of the Compact Clause is limited to agreements that are 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.' *Virginia v. Tennessee*, 148 US 503, 519, 37 L Ed 537, 13 S Ct 728 (1893). Whether a particular agreement respecting boundaries is within the Clause will depend on whether 'the establishment of the boundary line may lead or not to the increase of the political power or influence of the States affected, and thus encroach or not upon the full and free exercise of Federal authority.' Id., at 520, 37 L Ed 537, 13 S Ct 728. See *Wharton v.*

Wise, 153 US 155, 168-171, 38 L Ed 669, 14 S Ct 783 (1894).

"The proposed consent decree plainly falls without the Compact Clause under this test. New Hampshire and Maine are not here adjusting the boundary between them; the boundary was fixed over two centuries ago by the 1740 decree, and the consent decree is directed simply to locating this already existing boundary. Accordingly, neither State can be viewed as enhancing its power in any sense that threatens the supremacy of the Federal Government. * * *" (426 U.S. 363)

Because of Appellants' argument that the test of *Virginia v. Tennessee*, *supra*, as affirmed by this court in *Wharton v. Wise*, *supra*, and *New Hampshire v. Maine*, *supra*, is of limited application, it might be well to examine the history of the compact clause.

Read literally, Article I, Section 10, Clause 3 of the Constitution of the United States could be interpreted to mean that all interstate compacts or agreements require the consent of Congress before they can come into operation. This is apparently the erroneous view of the Appellants (except for certain boundary disputes) which they seek to have this court adopt.

Holmes v. Jennison, et al., 39 U.S. (14 Pet.) 540 (1840), is cited in support of this interpretation. The issue in that case, however, was whether an extradition agreement between the governor of Vermont and a Canadian official violated the compact clause because it was entered into without congressional consent. Chief Justice Taney announced that it did and that it made no difference whether the agreement was in writing or was merely a verbal understanding between the governor of Vermont and the Canadian official. But this did not involve a compact or agreement between states. Obviously, Vermont was encroaching upon federal supremacy in foreign affairs in dealing with Canada. Hence, *Holmes* is not support for the Appellants' rigid interpretation of the compact clause. As noted by one commentator:

"* * * It is understandable that greater circumspection should have been manifested in judging arrangements with foreign powers and arrangements between sister states, but this need not have led to a harsh construction of the compact clause. * * *"[3]

The next case by the United States Supreme Court on the scope of the compact clause was *Virginia v. Tennessee*, *supra*, 148 U.S. 503 (1893), in which the court refused to apply to a compact between sister states the criteria stated for control of foreign affairs in Justice Taney's opinion in *Holmes*, *supra*.

Virginia v. Tennessee, *supra*, involved a boundary dispute. The two states had, by agreement, appointed commissioners to establish the boundary. The legislatures of each state ratified the boundaries as established by the commissioners. In discussing the implications of the compact clause, with respect

[3]Engdahl, "Characterization of Interstate Arrangements: When is a Compact Not a Compact," 64 Mich. L. Rev. 63, 88 (1965).

to this agreement, the court stated as follows at 148 U.S. 503, 517-519:

> "Is the agreement made without the consent of Congress, between Virginia and Tennessee, to appoint commissioners to run and mark the boundary line between them, within the prohibition of this clause? The terms 'agreement' or 'compact' taken by themselves are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects; to those to which the United States can have no possible objection or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control.
>
> "There are many matters upon which different States may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York which the latter State might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter state to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed essential for that State to obtain the consent of Congress before it could contract with New York for the transportation of the exhibit line of two States should cross some malarious through that State in that way. If the bordering and disease producing district, there could be no possible reason, on any conceivable public

> grounds, to obtain the consent of Congress for the bordering States to agree to unite in draining the district, and thus remove the cause of disease. So in case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened States could not unite in providing means to prevent and repel the invasion of the pestilence without obtaining the consent of Congress, which might not be at the time in session. If, then, the terms 'compact' or 'agreement' in the Constitution do not apply to every possible compact or agreement between one state and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply?
>
> "We can only reply by looking at the object of the constitutional provision and construing the terms 'agreement' and 'compact' by reference to it. It is a familiar rule in the construction of terms to apply to them the meaning naturally attaching to them from their context. *Noscitur a sociis* is a rule of construction applicable to all written instruments. Where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubts may be removed by reference to associated words. And the meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used.
>
> "*Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.* • • •"
>
> (Emphasis added.)

The court later discussed the relation of the compact

clause to boundary disputes in particular (148 U.S. 503 at 520):

> "* * * The compact or agreement will then be within the prohibition of the Constitution or without it, according as the *establishment of the boundary line may lead or not to the increase of the political power or influence of the states affected, and thus encroach or not upon the full and free exercise of Federal authority.* (Emphasis added)[4]

Shortly after the decision in *Virginia v. Tennessee, supra*, this Court in *Wharton v. Wise, supra*, 153 U.S. 154 (1894), was confronted with the question of the validity of a compact between Virginia and Maryland, entered into in 1785, under the Articles of Confederation. This compact dealt with the regulation of commerce, navigation and fishing, and the exercise of jurisdiction over the Potomac River.

Article VI of the Articles of Confederation had provided that no two or more states could enter into any treaty, confederation, or alliance without the consent of Congress. In determining that the compact between Virginia and Maryland was not one of the type which required such consent, the court quoted extensively from *Virginia v. Tennessee, supra*, and then concluded as follows:

> "So, in the present case, looking at the object evidently intended by the prohibition of the Articles of Confederation, we are clear they were not directed against agreements of the character expressed by the compact under consideration. Its execution could in no respect encroach

[4]The emphasized language was quoted by this Court in *New Hampshire v. Maine, supra*, at 426 U.S. 363.

> upon or weaken the general authority of Congress under those articles. * * *" (153 U.S. at 170)

Thus, while the *Virginia v. Tennessee* rule could be characterized as dicta, this court's reliance on that rule in deciding *Wharton v. Wise, supra*, and *New Hampshire v. Maine, supra*, established that rule as controlling law.[5] The *Virginia v. Tennessee* interpretation of the compact clause has been the guiding principle from which the courts have not deviated since in applying the compact clause, irrespective of the nature or subject matter of the compact under consideration.

Thus, interstate agreements in aid of state taxation have been held valid without congressional consent under the *Virginia v. Tennessee test.*

[5]And in fact, as stated by Engdahl, footnote 3, *supra*, at page 69: "* * * in every case since *Virginia v. Tennessee* in which an interstate arrangement has been challenged for lack of congressional consent, it has been held exempt from the consent requirement. * * *"

An excellent article analyzing the authorities pertaining to congressional consent is titled, "The Compact And Agreements of States With One Another and With Foreign Powers" and is contained in 2 Minn. L. Rev. 500-516. The author there concludes, in regard to the Compact Clause and comparable constitutional provisions:

> "If we consider the history of these constitutional provisions together with the other provisions of the constitution which grant or limit authority, we are led to conclude that only political compacts or agreements which affected their (the states) sovereignty as between themselves or between them and the federal government were sought to be regulated or controlled.
>
> "We realize that the support to be found for this proposition in the federal cases is largely dicta yet such dicta have been long standing and, so far as we can learn, have never been judicially criticized." (Material in parenthesis added, 2 Minn. L. Rev. 514.)

In "Desty's Federal Constitution," Second Edition (1879) at page 193, which predated *Virginia v. Tennessee, supra*, the author notes that the compact clause relates to agreements or compacts which are political. It is there stated:

> "Such agreement or compact as is in its nature political * * * cannot operate as a restriction upon the powers of Congress under the Constitution. The prohibition is political, * * *"

In *Dixie Wholesale Grocery Company v. Martin*, 278 Ky. 705, 129 S.W.2d 181 (1939), a wholesale grocer sought an injunction to restrain the commissioner of Kentucky from prosecuting it under the state's cigarette stamp tax act. The plaintiff made sales to customers located in Ohio as well as in Kentucky, and attacked a regulation issued by the Kentucky commissioner, which required all cigarette dealers claiming exemption under the resale provision of the law to file with their cigarette tax returns the names and addresses of their out-of-state (Ohio) consignees of unstamped, and hence untaxed, cigarettes. This regulation had been issued in order to carry out an agreement, authorized by legislation between the Kentucky and Ohio taxing authorities, under which each had agreed to furnish the other the names and addresses of purchasers of unstamped cigarettes shipped to the latter state. The Kentucky court rejected the attack on the agreement as invalid under the compact clause for lack of congressional consent under the principle established by *Virginia v. Tennessee* that:

> "* * * inhibition in this section only applies to political alliances which may encroach upon the supremacy of the United States. That opinion recites: 'There are many matters upon which different states may agree that can in no respect concern the United States'." (278 Ky. at 711, 129 S.W. 2d at 184)

This court denied certiorari, 308 U.S. 609 (1939).

Roberts Tobacco Co. v. Department of Revenue,

322 Mich. 519, 34 N.W. 2d 54 (1948) involved an agreement similar to that involved in *Dixie Wholesale Grocery v. Martin, supra.* In upholding the constitutionality of the agreement, the court relied upon the *Martin* case and *Virginia v. Tennessee.*

Bode v. Barrett, 412 Ill. 204, 106 N.E. 2d 521 (1952), involved an Illinois motor vehicle tax for highway use. The act contained a reciprocity provision, under which the secretary of state was authorized to enter into agreements with other states to exempt their residents from the Illinois tax if the other states extended like treatment to Illinois residents. In rejecting the contention that the Illinois act and agreements reached thereunder violated the compact clause, the court first discussed *Dixie Wholesale Grocery v. Martin, supra*, and *Virginia v. Tennessee, supra*, and then concluded:

> "Consideration of these and other pertinent authorities impels the conclusion that the Federal constitutional interdiction of 'interstate compacts' was written into the organic law of the land in order to protect a then nascent republic from such *ententes* among powerful States as would aggrandize their political power at the expense or the compromise of national sovereignty. *The provision does not inhibit those purely fiscal interstate agreements that facilitate interstate commerce and aid in execution of internal revenue policies. This is particularly true when such agreements conduce to, rather than restrain, commerce among the several states.*" (Emphasis added) (196 N.E. 2d at 536)

In affirming the decision of the Illinois Supreme Court, this court stated as follows:

"We need notice only one other argument and that is that the statute requires Illinois residents to pay the tax, whereas nonresidents are exempted provided the states of their residence reciprocate and grant like exemptions to Illinois residents. * * * *And contrary to appellants' suggestions, that kind of reciprocal arrangement between states has never been thought to violate the Compact Clause of Art I, § 10 of the Constitution.* See St. Louis & S.F.R. Co. v. James, 161 US 545, 562, 40 L ed 802, 808, 16 S Ct 621; Kane v. New Jersey, 242 US 160, 168, 61 L ed 222, 227, 37 S Ct 30." (*Bode v. Barrett*, 344 U.S. 583 at 586 (1953)) (Emphasis added)

Most directly in point, the Compact itself has been held valid by three other courts in addition to the court below by reliance on the *Virginia v. Tennessee* test against claims that it required congressional consent.

In *Kinnear, et al. v. The Hertz Corporation*, 86 Wn. 2d 407, 545 P.2d 1186 (1976), the Supreme Court of Washington unanimously upheld the Compact against the same constitutional arguments raised here by the Appellants. The analysis of the constitutional questions by the Washington Supreme Court was similar to that employed by the three-judge court below. Federal district courts in Idaho and North Dakota have also upheld the Compact.[6]

[6]In *Multistate Tax Commission, et al., Petitioner v. Sperry Rand Corporation*, Respondent, United States District Court for the District of Idaho, No. 1-75-168, by order dated October 26, 1976, the District Judge upheld the joint audit provisions of the Multistate Tax Compact here in question by granting Petitioners' motion for summary judgment. In *Dorgan, Petitioner v. International Business Machines Corp.*, Respondent, and *Dorgan, Petitioner v. International Harvester Co.*, Respondent, U.S. District Court for the District of North Dakota, Southwestern Division, Nos. A1-74-24 and A1-74-25, respectively, by order dated October 7, 1976, the District Court held that the Respondents were required to make their books and records available for audit by auditors of the Commission.

Other types of interstate agreements not directly relating to the power of taxation have also been ruled valid under the *Virginia v. Tennessee* test without congressional consent:

(1) *Ham v. Maine-New Hampshire Interstate Bridge Authority*, 92 N.H. 268, 30 A.2d 1 (1943), held that congressional consent was not required for a compact under which an interstate bridge authority was established;

(2) *State v. Doe*, 149 Conn. 216, 178 A.2d 271 (1962) held that congressional consent was not required concerning a Connecticut statute which authorized the state welfare commissioner to enter into reciprocal agreements with other states for interstate transportation of poor and indigent persons pursuant to the interstate compact on welfare services; and

(3) *Landes v. Landes*, 1 N.Y.2d 358, 135 N.E. 2d 562, 153 N.Y.S. 2d 14, appeal dismissed 352 U.S. 948 (1956) held that congressional consent was not required concerning the New York uniform support of dependents act and the California uniform reciprocal enforcement of support act.

Finally, in a decision which predated *Virginia v. Tennessee* and undoubtedly influenced that decision, the Georgia Supreme Court in *Union Branch R.R. v. E.T. & Ga. R.R. Co.*, 14 Ga. 327 (1853) held that a compact between Georgia and Tennessee, which authorized construction of a railroad in the

two states, did not require congressional consent. The court stated in *Union Branch*:

> "1. * * * in our opinion, this prohibition (the compact clause) applies only to such an 'agreement or compact' as is in its nature political; or more properly, perhaps, such as may, in any wise, conflict with the powers which the States, by the adoption of the Federal Constitution, have delegated to the General Government.
>
> * * * * *
>
> "The framers of the Constitution clearly intended nothing more by this clause, than to prohibit the several States from exercising their authority in any way which might limit, or infringe upon a full and complete execution by the General Government, of the power's intended to be delegated by the Federal Constitution; because nothing more was to be gained by any further prohibition, no further benefit to the General Government could have been derived from it, and it would have been entirely superfluous and unnecessary.
>
> "It was very proper and expedient, that no State should have been allowed to enter into any compact with another State or Foreign Government, which, by involving the exercise of powers parted with by the States, and belonging to the Federal Government, might operate seriously to embarrass that Government. But it could work no injury to the General Government, for such State to make an agreement with another State, or even a foreign power, which in no wise conflicted with the authority delegated to the General Government, and tended in no manner to embarrass that Government, in the full and complete exercise of its powers. Unless we take this view of the case, we must hold that a State, without the consent of Congress, can make no sort of contract, whatever, with another State." (14 Ga. 339-340)[7]

Not only have the courts followed the *Virginia v. Tennessee* test, but also Congress has followed this test in its debates over congressional consent to compacts or agreements between the states. This is illustrated by the debate as to whether or not the Southern Regional Educational Compact required congressional consent. It was contended on the floor of the Senate that congressional consent was not required under the test of *Virginia v. Tennessee, supra.*[8] The Compact was put into effect without congressional consent. In fact, the *Virginia v. Tennessee* test has been before Congress for a considerable number of years. A volume entitled, "Constitution of the United States of America, Revised and Annotated 1924" (Washington Government Printing Office 1924—68th Congress, 1st Session—Senate Document No. 154) which was distributed to each congressman as his "constitutional bible," laid down the following test at page 373:

> "Such an agreement or compact as is in its nature political, or which may conflict with the powers delegated to the general government * * * cannot operate as a restriction upon the powers of Congress under the Constitution." (Citing among other cases *Virginia v. Tennessee, supra*, and *Wharton v. Wise, supra.*)[9]

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[7] *Cf. Dover v. Portsmouth Bridge*, 17 N.H. 200 (1845); *Fisher v. Steele*, 39 La. Ann. 447, 1 So. 882 (1887); *McHenry County et al. v. Brady*, 37 N.D. 59, 163 N.W. 540 (1917).

[8] 94 Cong. Record 5560, 5561, 5563, 5570, 5676, 5677, 5759, 5766 (1948).

[9] A comparable test was set forth in the "Constitution of the United States of America" (Revised and Annotated 1938) U.S. Government Printing Office, Washington 1938—74th Congress, 2d Session, Senate Document No. 232 at pages 368-370. As there stated:

In resolving the question of congressional consent, then, it is clear that the only established test is that contained in *Virginia v. Tennessee, supra*, and that test is whether a compact tends to increase the political power in the states in a manner which may encroach upon or interfere with the just supremacy of the United States.

Notwithstanding the extensive history of the *Virginia v. Tennessee* test, including its affirmance and application in *Wharton v. Wise, supra*, and *New Hampshire v. Maine, supra*, Appellants assert that the test in *Virginia v. Tennessee* is not here controlling and that it is limited to boundary disputes (Appellants' Br., 32) or that it is dicta (Appellants' Br., 12, 35).

The compact clause had its origin in the very practical problems which plagued the colonies before adoption of the constitution and which continued to plague the new states. These problems were, quite simply, the continuing controversies between the colonies and later between the states, often over boundaries.[10] During the colonial period, such controversies were settled by the Privy Council. With the formation of the new nation, a new mechanism had to be found to resolve these controversies which, during the

"Any agreement or compact which tends to the increase of the political power of the States or which may conflict with the powers delegated to the General Government * * * cannot encroach upon or interfere with the supremacy of the Federal Government, and so far as inconsistent with the Constitution will be superceded by it."

This document was also distributed to each member of Congress as his "consitutional bible."

[10]For a general discussion of these controversies, and their relationship to the compact clause, see *Virginia v. West Virgina*, 246 U.S. 565 at 596-600 (1918).

period of the Articles of Confederation, had "brought the states to the very verge of physical struggle" and were jeopardizing the existence of the new nation.[11]

The solution embodied in the constitution was three-fold. As stated by this court:

> "* * * the conferring on this court of original jurisdiction over controversies between the States, the taking away of all authority as to war and armies from the States and granting it to Congress, the prohibiting the States also from making agreements or compacts with each other without the consent of Congress, at once makes clear how completely the past infirmities of power were in mind and were provided against." *Virginia v. West Virginia*, 246 U.S. at 599.

Disputes between states necessarily involve a conflict between one state's claims of sovereign power and those asserted by another state. The disputes might involve conflicting assertions of state power over a geographical area, as in a typical border dispute; or they might involve claims over a river system, as in *Arizona v. California*, 373 U.S. 546 (1963). But whatever the subject matter of the dispute, the resolution necessarily involves the claims of one state receding—voluntarily or involuntarily—to accommodate those of another.

Where an accommodation between conflicting claims is worked out in voluntary agreement between the states involved in the dispute, that agreement might "* * * tend to increase and build the political influence of the contracting States, so as to

[11]*Virginia v. West Virginia, supra*, 246 U.S. at 598.

encroach upon or impair the supremacy of the United States * * *" *Virginia v. Tennessee, supra*, 148 U.S. at 518. In such a case, the resolution of the dispute must receive congressional consent.

The Compact, in contrast, is addressed to a completely different sort of problem. It does not even purport to readjust conflicting claims between the sovereign powers of different states; rather it simply represents a decision of the member states to utilize a common advisory agency in the exercise of one of their undisputed powers, i.e., to tax businesses such as those of the Appellants.

This court, in *Virginia v. Tennessee*, clearly recognized the distinction between cooperative agreements, such as the Compact in question, which do not require congressional consent, and conflict-resolving agreements which might require consent. Thus, in *Virginia v. Tennessee*, this Court gave two examples of such cooperative agreements, each involving joint action to solve a common public health problem which did not require congressional consent. See 148 U.S. at 518. The Compact in question is conceptually no different.

Most importantly, this court in *Virginia v. Tennessee* recognized the need for flexibility in the states to enter into cooperative agreements for joint action, without congressional consent. It was recognition of this need which prompted the court to characterize a literal reading of the compact clause as "the height of absurdity," 148 U.S. at 518, and to set forth the test which has been used ever since.

By construing the compact clause in the light of its historical purpose, as set forth in *Virginia v. West Virginia, supra*, and *Virginia v. Tennessee, supra*, this Court will preserve the flexibility which is required by the states under modern conditions.[12] Past history and present realities converge, and lead to the same conclusion.

In a further effort to distinguish *Virginia v. Tennessee, supra; Wharton v. Wise, supra;* and *New Hampshire v. Maine, supra*, Appellants argue that these cases have no application if a Compact "might affect subjects placed under the control of Congress." (Appellants' Br., 33, quoting from *Wharton v. Wise, supra*, 153 U.S. at 171)

But that quote does not support the Appellants' argument. Rather, it supports the position of Appellees. As noted by Dunbar, "Interstate Compacts and Congressional Consent," 36 Va. L. Rev. 753, 757 (1950), the language quoted from *Wharton v. Wise* (opinion written by Justice Field who wrote the opinion in *Virginia v. Tennessee*), supports the proposition that the states, in the exercise of powers reserved to them under the Constitution, are not always required to obtain congressional consent to exercise those powers by "agreement or compact." Appellants fail to recognize that the states have a

[12]Should the Appellants be able to convince the Congress that the tax treatment they are receiving from one or more states, be they compact members or not, is not in the national interest, the Congress may well be empowered to take corrective action under the commerce clause. But if the states are to be constrained in their efforts to produce uniformity in state and local taxation of multistate businesses, it should be done by the Congress, as a matter of deliberate legislative choice, and not by this court as a matter of constitutional necessity.

reserved power to deal with the subject of state taxation of multistate businesses in the absence of congressional legislation prohibiting such state action so long as the states do not exercise power forbidden by the commerce clause of its own force or effect. The compact in *Wharton v. Wise, supra* dealt with navigation rights on interstate waterways and the carrying on of commerce between the compact states over those waterways (153 U.S. at 163, 164). Thus, the compact in *Wharton v. Wise, supra,* dealt with an area which was clearly subject, under the Constitution, to congressional regulation. Justice Fields' statement pertaining to compacts which "might affect subjects placed under the control of Congress" (*Wharton v. Wise, supra,* 153 U.S. at 171) necessarily related to an area of *exclusive* congressional power, i.e., an area in which the states have no power to act even in the absence of congressional action. Otherwise, the compact in *Wharton v. Wise* would have been of the type which required congressional consent under the Constitution. Therefore, Appellants' argument that any compact dealing with interstate commerce requires congressional consent is in error.[13] The only compacts requiring congressional

[13]The congressional consent compact cases referred to *supra* in this brief which were held valid without congressional consent dealt with the subject matter of interstate commerce. *Dixie Wholesale Grocery Company v. Martin, supra,* 278 Ky. 705, 129 S.W. 2d 181, and *Roberts Tobacco Co. v. Department of Rev.,* 322 Mich. 519, 34 N.W.2d 54 (1948), dealt with interstate transportation of cigarettes; *Bode v. Barrett, supra,* 412 Ill. 204, 106 N.E.2d 521 (1952), aff'd 344 U.S. 583 (1953), pertains to the interstate use of motor vehicles; *Ham v. Maine-New Hampshire Interstate Bridge Authority, supra,* 92 N.H.268, 30 A.2d 1 (1943), *Union Branch R.R. v. E.P. & Ga. R.R. Co., supra,* 14 Ga. 327 (1853), and *Dover v. Portsmouth Bridge, supra,* 17 N.H. 200 (1845), were concerned with interstate transportation facilities; and

consent then are those which deal with an area of exclusive federal authority or which affect the political balance among the states to the detriment of federal power."[14]

The distinction we are making here was expressly recognized and applied by this court in *St. Louis & S.F.R. Co. v. James,* 161 U.S. 545 (1896). Involved in that case was an agreement between two states relating to regulation of an interstate railroad. This court stated:

> "It is competent for a railroad corporation organized under the laws of one State, when authorized so to do by the consent of the State which created it, to accept authority from another State to extend its railroad into such State and to receive a grant of powers to own and control, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second State.

State v. Doe, supra, 149 Conn. 216, 178 A.2d 271 (1962), and *Landes v. Landes, supra,* 1 N.Y.2d 358, 135 N.E. 2d 562 (1953), N.Y.S.2d 14, appeal dismissed, 352 U.S. 948 (1956), dealt with the interstate movement of persons for welfare and support payment purposes. *McHenry County v. Brady, supra,* 37 N.D. 59, 163 N.W. 540 (1917), dealt with an agreement in regard to an international drainage district. *Fisher v. Steele, supra,* 39 La. Ann. 447, 1 So. 882 (1887) upheld an interstate agreement for construction of a levee along the Mississippi River.

[14]This critical distinction we here make was established by this court in the early case of *Cooley v. Board of Wardens of the Port of Philadelphia, et al.,* 53 U.S. (12 How.) 298, 13 L. Ed. 996 (1851). In *Cooley,* this court was confronted with the problem of whether or not the states had the power to regulate a subject of interstate commerce—port pilots—in light of the constitutional grant of power to Congress to regulate interstate commerce. This court held that the grant of power to Congress to regulate interstate commerce did not of its own force and effect deprive the states of power over interstate commerce. In upholding the power of the states to regulate port pilots in a manner affecting interstate commerce, this court concluded:

> "We are of opinion that this state law was enacted by virtue of a power, residing in the State to legislate; * * *" (13 L. Ed. 1006)

Numerous decisions of this court hold that, within this court's guidelines and absent conflicting federal legislation, state taxation of multistate businesses is not a regulation of commerce within the purview of the commerce clause. *Northwest States Portland Cement Co. v. Minnesota,* 358 U.S. 450 (1959). (See also *infra* pgs. 46-50)

> Such legislation on the part of two or more States is not, *in the absence of inhibitory legislation by Congress*, regarded as within the constitutional prohibition of agreements or compacts between States." (Emphasis added) (161 U.S. 562)

Congress clearly had the power to pass "inhibitory legislation," for the subject matter of the legislation was an interstate railroad and interstate commerce. But until Congress did so, the states were free from the restrictions of the compact clause, and could work out a regulatory scheme of their own.

Thus, the history of the compact clause and the basic purpose for its inclusion in the Constitution of the United States dictates that the *Virginia v. Tennessee* test is controlling here.

B. **The Compact does not increase the political power of the states or encroach upon the just supremacy of the United States.**

The Compact leaves completely intact the individual member states' power over its sole subject matter, that of state and local taxes of multistate businesses. As found by the court below:

> "Applying the test of *Virginia v. Tennessee* and *New Hampshire v. Maine*, *supra*, to the Compact here in issue, the Multistate Tax Compact does not increase the political power of the party states. The Commission is vested with no taxing authority; the taxes which it administers are only those imposed by the respective states and subdivisions in accordance with state law.
>
> "Nor does the Commission have legislative power; it may propose model regulations where two or more party states or their subdivisions

> have uniform or similar laws. Such proposals may be adopted, modified, or rejected by the duly authorized tax officials of the affected states.[6] ([6]Proposing model uniform legislation is a function performed by such organizations as the National Conference of Commissioners on Uniform State Laws, bar organizations and public interest groups. As with the proposals of such groups, the recommendation of the Commission may be persuasive, but the decision whether to enact the recommended legislation or regulations lies solely with those officials designated by each state's constitution and laws.)
>
> "The Commission does have the power to conduct audits, but only at the request of a party state or its subdivision. In aid of this power, the Commission is authorized to seek the compulsory process of courts having jurisdiction within the party states. The Commission does not have the authority to enforce any tax liability; that, too remains within the jurisdiction of the respective taxing authorities. Any grievance that a taxpayer may have with the results of a Commission audit or the tax liability resulting therefrom is justiciable in the taxing state in accordance with the same procedures governing the grievances of intrastate taxpayers.
>
> * * * * *
>
> "The member states have ceded no sovereignty over tax matters to the Commission." (Jur. St. App. A, 11a-12a, 14a)

The Compact does not encroach upon or interfere with any federal power, including the power to regulate interstate commerce.

As also stated by the District Court below:

> "Similarly, it is clear that the Compact does not encroach upon or interfere with federal supremacy. Although Congress may be constitutionally empowered by the Commerce Clause, Article I,

§ 8, clause 3, to legislate and regulate the interstate administration of state tax systems, Congress has yet to exercise this power. Plainly, this failure to act has not preempted the states' powers in the field of multistate tax administration. Since the states may act individually in this area, there is no greater encroachment upon the federal interest by their acting cooperatively. Notwithstanding this Compact, Congress could enact comprehensive legislation that would preempt the power.

"In *Virginia v. Tennessee*, *supra*, at 518, the Court observed that '(t)here are many matters upon which different states may agree that can in no respect concern the United States.' Although the problems of multistate tax administration might be a concern of federal interest, that concern has not been evidenced by legislation in this area. As yet, there are no federal statutes or expressed Congressional policies with which this Compact could interfere. In the event of federal preemption in the future, dependants must withdraw *pro tanto* in order that any such federal statute shall be supreme." (Jur. St., App. A, 12a)

Under the Compact, the member states administer their own tax laws and do not delegate any of their authority to anyone. Each state, independent of the Compact, has the power to adopt uniform legislation, to audit Appellants' books and records on its individual account, to grant multistate taxpayers certain options in the determination of their tax liability, and to enter into reciprocal joint audit agreements with other states. By adoption of the Compact, each state has retained complete and absolute control over its own tax system. Furthermore, each state

has the inherent power to delegate audit responsibilities to a third party (Jur. St. App. A, 11a-12a).

The attempt by the legislatures of the member states to improve tax administration by creating the Commission as a purely advisory and recommendatory agency could not possibly alter the political balance among the states or between the states and the federal government.

Thus, the Compact and the implementation of its joint audit provisions are fully within the power and domain of the states. These provisions in no way shift political power among the states or encroach upon or interfere with the federal supremacy. Consequently, congressional consent is not required for their implementation. The federal government and the individual states retain the same power and the same supremacy with the Compact in force as they have without the Compact.

In sum, based upon the provisions of the Compact and their operative effect and based upon the uniform decisions of this court including *Virginia v. Tennessee*, *supra*, and *New Hampshire v. Maine*, *supra*, it is clear that the Compact does not require congressional consent for its validity.

In fact, there is a serious question as to whether the Compact is an "agreement or compact." The fact that it is called a compact is not controlling. As indicated in a comment entitled, "What Did the Framers of the Federal Constitution Mean By

'Agreements or Compacts'?" 3 U. Chi. L. Rev. 453 (1936), there is no reliable history in the constitutional convention proceedings or otherwise to indicate what was to be encompassed by the term "agreement" or "compact" as used in Article I, § 10, clause 3 of the Constitution of the United States. Clearly, the Compact in question does not impose any binding agreement on any state. Any state is free to join or withdraw from the Compact at will, as exemplified by the withdrawal of Illinois. The operative provisions of the Compact are merely reciprocal arrangements among the party states for their mutual benefit in administering their state tax laws as applied to multistate-multinational businesses.

While it is true that the advisory and recommendatory functions of the Compact are carried on through a Commission and the Compact is supported by legislation in the member states, the functions of the Commission could be just as well discharged by the tax administrators of the member states on an ad hoc basis without any formal agreement whatsoever. They certainly could provide for advisory regulations in the interpretation of uniform law such as that contained in UDITPA without any "compact" or "agreement" whatsoever.

Likewise, the states could enact the uniform legislation contained in the Compact and provide for joint audits of multistate taxpayers without the necessity for a "compact" or "agreement." This Court in *Bode v. Barrett, supra*, 344 U.S. 583, 586

(1953) noted that, "* * * reciprocal arrangement between states has never been thought to violate the Compact Clause. * * *" Basically, this is at most all the Compact consists of. Its only added feature is cooperative administration of uniform state legislation which has never been hinted as constituting a binding compact or agreement by the states participating in such cooperative administrative action. Member states can act totally independent of the work and administration of the Compact by the Commission. They can participate as joint administrators in promulgating advisory regulations or in joint audits and completely ignore the results. In no manner or means is any action by the Commission binding in any way on any member state.

Under these facts, which cannot here be disputed, it is difficult to perceive the Compact in question as the kind of arrangement that is a "compact" or "agreement" within the intent of Article I, § 10, clause 3 of the United States Constitution. Certainly, this clause must refer to an arrangement, contractual in nature, that has some binding effect or contains binding obligations on the participants. Thus, the *Bode v. Barrett* test, wherein the court has held that reciprocal legislation is exempt from the congressional consent requirement of Article I, § 10, clause 3, is precedent for holding that the Compact in question does not require congressional consent.

In fact, reciprocal legislation, such as that up-

held in *Bode v. Barrett* is more obligatory on the states participating in such legislation than is the Compact.

II

THE MULTISTATE TAX COMPACT DOES NOT ENCROACH UPON FEDERAL SUPREMACY IN THE AREA OF INTERSTATE COMMERCE BECAUSE IT DEALS WITH A SUBJECT MATTER LEFT EXCLUSIVELY TO THE DOMAIN OF THE STATES ABSENT ANY CONFLICTING FEDERAL LEGISLATION.

In the absence of congressional legislation on the subject, the states are free to impose their taxes on multistate businesses within the guidelines laid down by this Court. (*Cooley v. Board of Wardens of the Port of Philadelphia, et al., supra*, 53 U.S. (12 How.) 298, 13 L. Ed. 996 (1851). This Court has issued many decisions upholding the validity of state taxes imposed on multistate businesses against the claim that those taxes violate the Commerce Clause. All of those decisions refute Appellants' contention that the Compact is invalid because it deals with interstate commerce; and indeed, directly or indirectly, any tax (including property taxes) to some extent affects interstate commerce.

The fact that a business activity is the subject of regulation by the Congress does not preclude state taxation. As stated in *Polish National Alliance v.*

National Labor Relations Board, 322 U.S. 643, 649 (1944):

> "* * * federal regulation does not preclude state taxation and state taxation does not preclude federal regulation."

This principle was reaffirmed in *Federal Power v. Union Electric Company*, 381 U.S. 90 (1965), Footnote 7, in the following context:

> "Utah Power & Light Co. v. Pfost, 286 US 165, cited by the Court of Appeals, is not opposed. The Court there held that a State had power to impose a tax on a company generating electric energy for distribution in interstate commerce. This, of course, does not control the commerce powers of Congress. Cf Edison Co. v. Labor Board, 305 US 197; Polish Alliance v. Labor Board, 322 US 643, 649: '(F)ederal regulation does not preclude state taxation and state taxation does not preclude federal regulation.'" (381 US 95)

This Court has specifically held that state taxation of multistate businesses is not a regulation of interstate commerce. *Portland Cement Co. v. Minnesota and Williams v. Stockham Valves & Fittings, Inc., supra*, 358 US 450 (1959). In upholding the income taxes there under attack as applied to interstate businesses, the court noted that the taxes "* * * are not regulations [of interstate commerce] in any sense of that term" (bracket material interpolated) 358 US 461. In fact, the grant of power to Congress by the commerce clause to regulate interstate commerce does not withdraw from the states the authority to regulate such commerce with respect to matters

of local concern on which Congress has not spoken. *Parker v. Brown*, 317 US 341, 360 (1942).

If the states lack power to legislate in the area of state and local taxation of businesses engaged in interstate commerce except as permitted by Congress, all state and local taxation of Appellants and the class they purport to represent would be invalid. Thus, cases like the recent case of *Colonial Pipeline Co. v. Traigle, Collector of Revenue of Louisiana*, 421 U.S. 100 (1975) and *Complete Auto Transit, Inc. v. Brady*, ... U.S. ....., 51 L. Ed 2d 326, 97 S. Ct. 1076 (1977) would have been improperly decided.

In no sense can the advisory powers granted the Commission be construed as an unconstitutional regulation of interstate commerce. In specific reference to the controversy here, an audit in aid of the enforcement of a tax is no more a regulation of interstate commerce than the tax itself. Furthermore, a joint audit is no more a regulation of interstate commerce than individual audits by the states participating in the joint audit.

The District Court properly analyzes the commerce clause argument of Appellants as follows:

> "Plaintiffs next contend that the Compact violates the Commerce Clause in several respects. Plaintiffs' first contention in this regard is that Congress, under its power to regulate interstate commerce, has preempted the field. As we noted previously regarding the issue of encroachment upon federal supremacy, there has been no such federal preemption. It is now established that

> '* * * federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.' *Florida Lima & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

"See also *Merrill Lynch, & c. v. Ware*, 414 U.S. 117, 139 (1973). There is nothing inherent in the problems of multistate tax administration that would require federal regulation, nor has Congress yet identified these problems as a matter of peculiar federal concern.

"Second, plaintiffs contend that the Compact imposes an undue and unreasonable burden upon interstate commerce.

> 'It is a truism that the mere act of carrying on business in interstate commerce does not exempt a corporation from state taxation. "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business." *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938).' *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 108 (1975).

"Indeed, plaintiffs do not contend that the Commerce Clause bars imposition of the respective state taxes which the Commission is charged with administering for the benefit of member states. A necessary correlative of the power to impose taxes is the power to audit, and determine the tax liability properly for each taxpayer.

"The stated purposes of this Compact,

supra, are to promote uniformity among state tax systems, ease taxpayer compliance and minimize the risk of duplicative taxation of the multistate taxpayer. Plaintiffs contend that the Compact promotes disparity, not uniformity. In support of this contention, plaintiffs argue that the voluntary nature of Compact membership and the fact that only twenty-one states have joined necessarily limits its reach. Plaintiffs further argue that the advisory powers granted to the Commission are insufficient to override the differences in the substantive tax laws of the party states. *Plaintiffs' characterization here of a compact binding only a loose and powerless confederation stands in sharp contrast to their simultaneous characterization of the Compact as intruding upon the federal supremacy and increasing the political power of the states.* That the Compact may promise more than it has as yet achieved is no ground for finding unconstitutionality. The member states have ceded no sovereignty over tax matters to the Commission. The fact that the Compact might promote a consensus among party states on principles of allocation of revenues or other matters, does not create an impermissible burden upon interstate commerce. This is so for at least two reasons: first, even without the Compact, the states could enact parallel or uniform tax legislation, as has been done with UDITPA itself; and second, any agreement between two or more states to observe an identical principle of state tax law diminishes the existing possibility of fifty disparate state tax results. In sum, we find no merit to the contention that the Compact is an unconstitutional burden upon interstate commerce." (Emphasis added) (Jur. St. App. A. 13a-15a)

III

THE COMPACT IS NOT INVALID WITHIN THE PURVIEW OF THE COMMERCE, EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION BECAUSE THE COMPACT DOES NOT UNREASONABLY BURDEN INTERSTATE COMMERCE OR UNCONSTITUTIONALLY DISCRIMINATE AGAINST MULTISTATE TAXPAYERS.

The interstate commerce and Fourteenth Amendment (equal protection and due process) arguments of Appellants have been thoroughly demolished by the opinion below.[15] (Jur. St. App. A 13a-20a) We believe that this opinion is so persuasive as to require little further argument.

Assuming, arguendo, that there are differences in the standards applicable to multistate taxpayers under the Compact and applicable to intrastate taxpayers under member state laws, various principles of constitutional law prevent Appellants from successfully relying on those differences to invalidate the Compact.[16]

Appellants must establish that the alleged differences are significant and result in an actual or threatened injury which denies them constitutional rights.

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[15]For all practical purposes, these arguments have been abandoned on this appeal. Clearly, the Compact should not be declared invalid under the commerce clause or Fourteenth Amendment because of alleged abuse by its executive director in his advisory role to the Commission and member states. (Appellants' Brief, 48-51)

[16]The lower court specifically held: "The different treatment, if any, accorded multistate taxpayers by the Compact is a permissible legislative response to what is perceived as the different circumstances of the multistate taxpayer." (Jur. St. App. A 20a)

Re 620 Church Street Building Corp., 299 U.S. 24, 27 (1936); *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, 544, 545 (1914). *General Trading Co. v. State Tax Commission*, 322 U.S. 335, 338 (1944). A distinction in form is not sufficient. *Gregg Dyeing Co. v. Query*, 286 U.S. 472 (1932).

This court has upheld a variety of differences between state taxes as they pertain to multistate business as compared to intrastate businesses against the argument that these differences deny multistate businesses constitutionally protected rights. Appellees are aware of no decision of this court that has even hinted that administrative differences in determining the tax liability of multistate businesses, as compared to intrastate businesses, violate any federal constitutional rights of multistate businesses.

In *Henneford v. Silas-Mason Co.*, 300 U.S. 577 (1937), and in *Nelson v. Sears Roebuck & Co.*, 312 U.S. 359 (1941) this court noted that the methods used to collect taxes imposed upon multistate businesses there involved were different from those used to collect taxes imposed upon intrastate businesses. These differences were deemed immaterial by the court.[17] There is thus nothing in the commerce clause discrimination cases that would lend support to the

[17]In fact, this court has upheld tax statutes as nondiscriminatory as to interstate businesses so long as comparable taxes are imposed somewhere along the tax chain on intrastate businesses. *Hinson v. Lott*, 75 U.S. 148 (1869); *Gregg Dyeing Co. v. Query, supra*; *Henneford v. Silas-Mason Co., supra*; *Alaska v. Artic Maid*, 366 U.S. 199 (1961); *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926); *Cashey Baking Co. v. Virginia*, 313 U.S. 117 (1941); *Nelson v. Sears Roebuck & Co., supra*. In fact, the identical tax burden is not required to be placed on interstate businesses as compared to intrastate businesses. *General American Tank Car Corp. v. Day, supra*; *Alaska v. Artic Maid, supra*.

argument that the differences between the Compact standards in relation to multistate taxpayers and member state standards in relation to intrastate taxpayers are significant under the commerce clause.

In order for Appellants to establish that the compact denies them equal protection or due process of the law, they must establish that multistate taxpayers cannot be classified differently from intrastate taxpayers. However, such classification is permissible unless it is arbitrary and capricious; and unless no imagined set of facts would justify the classification. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973); *Madden v. Kentucky*, 309 U.S. 83 (1939); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959).

Multistate businesses, by the very nature of their activities within a particular state, must of necessity be treated differently than purely local businesses. The problems involved in auditing a multistate-multinational corporation with national and international operations are vastly different from those involved in auditing the local grocery store. This alone disposes of the argument that the compact denies Appellants equal protection or due process of law. The differences applicable to intrastate taxpayers as compared to interstate taxpayers are based on a reasonable classification. The reason is that they rest on "some ground of difference having a fair and substantial relation to the object of the legislation." (*Stebbins v. Riley*, 268 U.S. 137, 142 (1925))

The important consideration here is that under the compact multistate taxpayers and intrastate taxpayers retain the same substantive rights concerning state and local taxation. *Metropolitan Co. v. Brownell*, 294 U.S. 580 (1935); *American Motors Insurance Co. v. Starnes*, 425 U.S. 637 (1976). There is no claim here that they have not.

In sum, as found by the three-judge court below, the Appellants' commerce clause, due process clause and equal protection clause arguments are totally lacking in merit.

IV
FURTHER ANSWERING APPELLANTS' POINTS

A. Introduction

We have shown above:

1. The rule of *Virginia v. Tennessee* is not dictum but is the law of this land as ruled in *New Hampshire v. Maine*. (*Supra*, pp. 21-22)

2. The rule of *Virginia v. Tennessee* applies to any and all agreements between the several states and not just to boundary agreements. (*Supra*, pp. 27-40)

3. The rule of *Virginia v. Tennessee* requires that Appellants demonstrate that the agreement tends to increase the political power of the combining states and encroaches upon or interferes with the just supremacy of the United States. (*Supra*, pp. 20, 25)

4. Appellants have made no such showing and

indeed the contrary is true; the Compact at bar does not increase the political or any other power of any or all of the member states and there is no encroachment upon or interference with any supremacy, just or otherwise, of the United States. (*Supra*, pp. 3-5, 40-46)

5. The Compact does not in any wise interfere with or impede interstate commerce and involves local taxation only in areas left exclusively to the respective states. (*Supra*, pp. 46-50)

6. The Compact does not in any wise deny equal protection or due process to Appellants or anyone else, nor does it burden, unreasonably or otherwise, interstate commerce. (*Supra*, pp. 51-54)

The Appellants have abandoned any effort to convince this Court that any provision of the Compact on its face requires congressional consent for its validity. They rely instead on what they represent as facts concerning its administration. Appellants have also abandoned any effort to show that this purported administration of the Compact requires congressional consent because it increases the political power of the states or because it encroaches upon federal supremacy. Rather, the Appellants contend that if the administration of the Compact has some effect on or interference with the interest of the nation or nonmember states, it requires congressional consent and that it is up to Congress to determine this (Appellants' Br. 12, 34, 35). Appellants then argue by reference to matters completely without the record and by broad sweeping conclusions, not

supported by any authority and contrary to fact, that the Compact is a regional effort of the western states and that its administration interferes with the interest of nonmember states and the federal government (Appellants' Br. 11, 35-47).

They center this argument on what they purport to be the rules and practices of the Commission in regard to "combined reporting" and "full apportionment of nonbusiness income" (Appellants' Br. 25-28, 35-46). Since neither the Compact nor the rules and practices of the Commission provide for "combined reporting" or "full apportionment of nonbusiness income" and since the Commission has no power to fix or determine any tax liability of any multistate taxpayer or any policy for any state, this argument is (a) irrelevant, and (b) lacks any foundation in law or fact. The Commission simply does not have any power to affect or interfere with the interest of the nation or nonmember states.

Similarly, a great deal of the Appellants' Brief consists solely of argument intended to discredit the Compact, the Commission and its work in the eyes of this Court. They assert that:

> "The adoption of rules or practices which conflict with the laws of the member states appears to be a recurrent custom of the Commission." (Appellants' Br. 29)

This argument, too, is (a) irrelevant and (b) lacks any foundation in law or fact. It is irrelevant because administration of the Compact is not at issue; and it lacks any possible factual or legal

foundation because the rules and practices of the Commission are not binding on any state and therefore could not conflict with the law of any state. The Commission simply has no power to fix or determine the tax liability of any multistate taxpayer. Not surprisingly, Appellants have not cited a single case in which the rules and practices of the Commission have been found to be violative of state law.

These introductory comments are intended to apprise the Court of the irrelevancy and lack of any possible factual or legal foundation for most of Appellants' argument. In constitutional cases, such as this, this Court has consistently rejected unsupported assertions of fact and hypothetical arguments to invalidate state laws under the Constitution of the United States. *General Motors Corp. v. Washington*, 377 U.S. 436 (1964).[18] It should do so in the instant case.

Though the Appellants' argument is wholly irrelevant in determining the validity of the Compact on its face, we do wish to point out, however, some serious misstatements and arguments of Appellants.

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[18]The District Court below placed Appellants' argument here in the appropriate context as follows:

> "No contention is made that the Compact is being administered other than according to its terms, except as to particulars governed by the substantive tax law of the respective party states. The constitutional issues posed by this complaint reduce themselves to questions of law.
>
> "Certain of the issues of fact which Plaintiffs would seek to raise are purely hypothetical and speculative. As to these issues, Plaintiffs have not 'set forth specific facts showing there is a genuine issue for trial' Rule 56(a) F.R.Civ.P. Certain other claimed issues of fact are plainly not material to the determination of the merits of the constitutional arguments raised here, although they may be of academic interest 'to the various states in determining whether to join or continue membership in the Compact." (Jur. St. App. A. 3a)

B. **In arguing that the Compact requires congressional consent, the Appellants ignore the test laid down in Virginia v. Tennessee, supra, as affirmed by this court in Wharton v. Wise, supra, and New Hampshire v. Maine, supra, and contrary to those cases assert that all modern compacts require congressional consent which assertion would result in an unwarranted shift of power to Congress.**

Appellants in substance are arguing that all compacts or agreements among the states which deal with subject matters of general interest require congressional consent (Appellants' Br. 12, 19-20, 32-35). In the Appellants' view, it is immaterial that a compact or agreement is purely an advisory arrangement and deals solely with administrative matters pertaining to a subject of direct concern only to member states and pertaining solely to powers reserved to the member states under the Constitution of the United States. Thus, Appellants argue that all interstate arrangements of the states, however informal and advisory, require a shift of political power from the states to the Congress.

Appellants' construction of the compact clause would have far-reaching effect and would be destructive of any kind of cooperative effort by the states to produce uniformity and to prevent avoidance of just taxes by multistate taxpayers. This is particularly so when it is realized that a compact or agreement within the purview of the compact clause need not be reduced to writing or constitute a formal ar-

rangement among the states (*Holmes v. Jennison, et al.*, supra, 39 U.S. (14 Pet.) 540 (1840)), and when it is realized, as indicated at length in the Appellants' Brief, that Congress does not play a passive role in giving its consent to a compact or agreement among the states. In the case at bar, Appellants are saying that the tax administrators of the member states of the Compact cannot confer together concerning common problems, agree on joint audits of multistate-multinational taxpayers and issue recommendations in the form of advisory rules and regulations without the control and consent of Congress. Thus, according to Appellants' view, each state must "go it alone" in resolving problems of state and local taxation of multistate businesses or they must deal with these problems as they arise from time to time only after receiving congressional consent. Certainly, this could not be the intent of the constitutional restraint on compacts.

Twenty-four states under the auspices of the Commission have entered into reciprocal exchange agreements for the exchange of information concerning taxpayers.[19] Under the Appellants' view of the compact clause, this agreement standing alone would require congressional consent. If several states should agree that they would conduct cooperative (joint) audits of selected multistate taxpayers, Appellants would require that such agreement be given congressional approval and that Congress could prescribe the

[19]Ninth Annual Report of the Multistate Tax Commission (1976), Appendix B, pp. 24-25.

rules or guidelines for such audits. On March 8, 1977, the Executive Officer of the Franchise Tax Board of the State of California, Mr. Martin Huff, and the Director of the Oregon Department of Revenue, Mr. John Lobdell, entered into just such an agreement. Since both California and Oregon follow the unitary concept and worldwide combination in imposing taxes on or measured by net income, Appellants argue that Congress could prevent them from doing so in reference to any joint audit pursuant to such an agreement, although each state individually could do so. This is of course what Appellants are arguing in regard to the joint audit program of the Commission.

Under Appellants' reasoning, the National Association of Tax Administrators could not function without congressional consent. This organization has a permanent staff. It is financed by the member states; and from time to time recommends that the states take particular actions in regard to any subject of general concern involving state and local taxation. A committee of this organization proposed uniform regulations for the Uniform Division of Income for Tax Purposes Act. At the Forty-Fourth and Forty-Fifth Annual Meeting of the National Association of Tax Administrators, the status of the United States-United Kingdom Income Tax Treaty and congressional foreign source income proposals were discussed and were a subject matter of resolutions by that body at those meetings. These resolutions oppose the proposed treaty limitations on state taxing power. Under Appellants' reasoning, any such con-

certed action by state tax administrators would be characterized as interference with foreign commerce and therefore invalid because it has not been recommended by an interstate agency which has received the consent of Congress.

In the tax field alone, there are numerous organizations of the states which deal with the same subject matters that are dealt with by the Commission. These organizations discuss common interstate taxation problems and propose rules and regulations or legislative action for their solution. They have at least as great or greater potential impact on federal policies or the interest of nonmember states as does the Commission. Yet, their constitutional validity has never been challenged.

The unwarranted and far-reaching effect of Appellants' construction of the Compact Clause lends validity to the test of *Virginia v. Tennessee*, *supra*, and the recent affirmance of that test in *New Hampshire v. Maine*, *supra*, to resolve the question of when congressional consent is require for any agreement or compact among the states.

C. Appellants erroneously contend that the Compact is a regional effort which interferes with the national interest and the interests of nonmember states. (Appellants' Br. 35-47).

Assuming, arguendo, that this Court were to abandon the *Virginia v. Tennessee*, *supra*, test and require congressional consent for compacts which,

in the Appellants' words, "interfere" with the national interest or the sovereignty (i.e. tax policies) of nonmember states, it is clear that the Compact does not so "interfere."

Appellants argue that the Compact interferes with the conduct of foreign affairs (Appellants' Br. 32-42) because "combined reporting" which is utilized for the purposes of state taxation by some states is not utilized by the federal government for federal income tax purposes. Since no provision of the Compact requires "combined reporting," this argument of Appellant lacks any factual or legal foundation.

Next, Appellants argue that the Compact has a serious impact on interstate commerce (Appellants' Br. 42-44) because "combined reporting" ("unitary business") and the apportionment of non-business income may result in multiple taxation and in increased costs of compliance. Since the Compact does not require combined reporting and since Article IV of the Compact specifically provides for the allocation of nonbusiness income, this argument of Appellants likewise lacks legal or factual foundation.

Appellants then argue that the Compact interferes with the sovereignty and revenue policies of the nonmember states (Appellants' Br. 45-47) because "combined reporting" and the apportionment of nonbusiness income deprives nonmember states of their ability to offer tax incentives to selected businesses. Since Article IV of the Compact specifically provides for the allocation of nonbusiness income and the Compact does not require combined reporting, this

argument also lacks any legal or factual foundation.

The foregoing illustrates the complete fallacy of the Appellants' argument that the *Compact* interferes with the national interest or the interest of the nonmember states. The most serious defect in Appellants' argument is the gap between what the Compact provides for in accordance with its terms and what the Appellants attribute to the Compact. The only provision of the Compact which has any bearing on Appellants' argument is Article IV which contains the Uniform Division of Income for Tax Purposes Act. Where any state adopts this Act, whether or not a member of the Compact, its adoption would have no effect on foreign affairs and no adverse impact on interstate commerce or the tax policies of nonmember states which Appellants erroneously attribute to the Compact. Therefore, it is not the Compact itself which is the subject matter of Appellants' complaints, but rather, UDITPA.

Though wholly irrelevant, we will now turn to a more detailed analysis of the specific elements of the Appellants' argument.

1. **Appellants' assertion that the Compact is a regional effort of the western states which conflicts with the interests of nonmember states is not in accordance with the history of the Compact.**

The Appellants assert that the Compact is a regional effort of the western states which adversely affects the interests of nonmember states. This argument is contrary to the history of the Compact and ignores the fact that a majority of the states are

either regular or associate members of the Compact. In addition to its regular members, the Compact has thirteen associate members consisting of the states of Alabama, Arizona, Georgia, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, Oklahoma, Pennsylvania, Tennessee and West Virginia.[20]

An examination of the history of the Compact reveals that it was and is an effort by *all* the states to produce greater uniformity, certainty and equity and ease of compliance burdens in state and local taxation of multistate taxpayers.[21]

This Court should thus reject the Appellants' assertion that the Compact is a regional effort of some tax administrators which has a detrimental impact on nonmember states. All of the states participated in its formation and agree with its fundamental purposes of achieving greater uniformity, certainty, ease of compliance and equity in state and local taxation of multistate businesses. There is absolutely no provision of the Compact that has a regional bias. Once the constitutionality of the Compact is firmly established by this Court, it is anticipated that many nonmember states will become members. It is to their interest and the interest of the Nation for them to do so.

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[20]Ninth Annual Report of the Commission (1976), pp. XIV-XVI. Associate membership has been by designation of the governors of the associate member states and entitles the states to full participation in the activities of the Commission except voting and officer privileges.

[21]First Annual Report of the Commission (1968), pp. 1-2; Revenue Administration, National Association of Tax Administrators, Thirty-Fourth Annual Conference, Chicago, Illinois (1966), pp. 15-20; P.H. State and Local Taxes; All States Unit, para. 5100.

2. The Appellants erroneously argue that the Commission has issued invalid regulations calling for full apportionment of nonbusiness income of multistate-multinational taxpayers, contrary to state law and traditional practices. (Appellants' Br. 13, 26-27, 46,48)

While not material in determining the validity of the Compact on its face and the need for congressional consent, Appellants place in issue the validity of the Commission regulations pertaining to the Uniform Division of Income for Tax Purposes Act (Article IV of the Compact) and contend that these regulations are not in accordance with law and alter traditional patterns of taxing income from intangible properties by the state of commercial domicile (Appellants' Br. 13, 26-27, 46).

The Appellants' argument that the Commission regulations require full apportionment of nonbusiness income is defective for at least four reasons: (1) it is totally irrelevant and immaterial; (2) if the regulations are invalid and are adopted by any state, the Appellants and other multistate taxpayers have adequate remedies under state law to prevent the application of these regulations to them; (3) the regulations do not provide for apportionment of nonbusiness income; and (4) traditional practice has not been to assign all income from intangibles to the commercial domicile of the taxpayer.

Appellants' assertion that all income from intangible properties has traditionally been allocated to the commercial domicile for state income tax

purposes (Appellants' Br. 26) is refuted by the "Willis Report." Volume 1 of that Report,[22] pages 197-232, deals with the problem of specific allocation of income and deductions therefrom by state practices at the time of the Report. The report noted on page 198:

> "On the basis of the methods which they used to determine what income is specifically allocable, the States may be divided into three groups: (a) those which rely solely on an itemization of the particular types of income to be specifically allocated; (b) those which distinguish between business income and nonbusiness income; and (c) those which distinguish between unitary business income and other income."[23]

In an Indiana survey,[24] in answer to the question, "Does your state (ever) include dividends in the apportionment base?" 31 states answered "yes."

Interestingly, the Willis Report indicates:

> "* * * it should be noted that New York also distinguishes between 'business income' and 'investment income.' However, in New York 'investment income' is not specifically allocated but is apportioned by a formula based upon the amount of investment capital employed in that

[22]Report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary House of Representatives, 88th Cong., 2nd Sess., HR 1480 (1964).

[23]Because of the wide variety of practices and inconsistencies in the specific allocation of items of income, including those from intangible properties, and because of the problems associated with determining the deductions from income attributable to specifically allocated income items, the Willis Subcommittee recommended full apportionment of all income. (The Report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary House of Representatives, House Report No. 952, 89th Cong., 1st Sess., p. 1144)

[24]The State of Indiana conducted a survey to determine state progress toward uniformity. It published the results in a report entitled, "Results of a Survey of the Uniformity of State Tax Laws by the State of Indiana," dated February 15, 1977. This report is referred to several times in this brief and is reproduced as Supplement A to this brief.

> State." (Vol. 1 of the "Willis Report," 88th Cong., 2nd Sess., HR 1480 (1964), p. 199)[25]

Appellants further erroneously conclude that the Commission regulations do not provide for the apportionment of nonbusiness income.[26]

[25]Case authority also supports the proposition that income from intangible properties have been apportioned as part of unitary or business income. See *International Harvester v. Department of Tax.*, 322 U.S. 435 (1944), and *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940) (upholding the apportionment of income from dividends against the payor corporation based on its in-state activities); *Appeal of U.S. Steel Corp.*, Appeal No. 73-I-20 (Idaho B.T.A. Nov. 1, 1973), and *Appeal of Capital Southwest Corp.*, CCH Cal. Tax Rep. para. 204-881 (S.B.E. Jan. 16, 1973) (wherein the Boards respectively upheld dividends and interest income as business or unitary income). In addition, see *Montgomery Ward & Co. v. Commissioner of Tax.*, 276 Minn. 479, 151 N.W.2d 294 (1967); *Great Lakes Pipeline Co. v. Commissioner of Tax.*, 272 Minn. 403, 138 N.W.2d 612 (1965), appeal dismissed, 384 U.S. 718 (1966) (wherein the courts held that interest income was business income subject to apportionment). Cf. *F. W. Woolworth Co. v. Director of Div. of Tax*, 45 N.J. 466, 213 A.2d 1 (1965); *Gulf Oil Corp. v. Morrison*, 120 Vt. 324, 141 A.2d 671 (1958); and *F. W. Woolworth Co. v. Commissioner of Taxes*, 130 Vt. 544, 298 A.2d 839 (1972) (in which dividend income was subject to apportionment either as business income or part of the unitary income of the payee corporation).

In determining the significance of investments to the overall business operations, this court aptly noted in *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911):

> "Nor can it be justly said that investments have no real relationship to the business transacted by a corporation. The possession of large assets is a business advantage of great value; is may give credit which will result in more economical business methods; it may give a standing which shall facilitate purchases; it may enable the corporation to enlarge the field of its activities and in many ways give it business standing and prestige." (220 U.S. 166)

[26]Section 1 of Article IV of the Compact (Jur. St. App. E. 38a) defines nonbusiness income as all income other than business income and defines business income as

> "Income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations."

The regulations of the Commission implement this language (Reg. IV.1, Seventh Annual Report of the Commission, pp. 64-69).

The regulations contain examples of nonbusiness income subject to specific allocation. For example, Reg. IV.1.(c)(4) Example (vi) reads:

> "The taxpayer is engaged in a multistate glass manufacturing business. It also holds a portfolio of stock and interest-bearing securities, the acquisition and holding of which are unrelated to the manufacturing business. The dividends and interest income received are nonbusiness income." (Seventh Annual Report, Multistate Tax Commission (1974), Appendix J, p. 68)

Nor is there merit to the Appellants' wholly irrelevant argument that the Commission's UDITPA regulations are invalid (Appellants' Br. 27, 48). In so arguing, the Appellants have not directed the Court's attention to any provision of UDITPA or any provision in the regulations or to any case authority interpreting UDITPA.[27]

From the foregoing, it is clear that Appellants' efforts to raise a congressional consent issue concerning the Commission's regulations implementing UDITPA lacks support in fact. Furthermore, if the regulations in fact provided for full apportionment of nonbusiness income contrary to UDITPA and changed the traditional rule of assigning income from intangibles to the commercial domicile, this does not invalidate the Compact.

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[27]In support of this argument, they rely instead on cases set forth in footnote 22 (p. 26) and articles cited in footnotes 43, 44 (p. 27) and 68 (p. 48) of their brief. The cases relied upon are not UDITPA cases. Three of the four articles relied upon are not directed to the question of whether or not the UDITPA regulations of the Commission are valid and the fourth article does not analyze the regulations in reference to the UDITPA language and case authority.

The article of the Executive Director of the Commission referred to in footnote 43 and the article of the Commission's general counsel referred to in footnote 68 do not support the propositions for which they are cited. The Commission's staff has never taken the position that the Commission's UDITPA regulations are invalid in any respect or require full apportionment of nonbusiness income.

The fact, as indicated by the Indiana survey (footnote 24, supra; Supplement A), that eighteen states have adopted UDITPA regulations which substantially conform to the Commission's regulations, support their validity.

Furthermore, the courts that have dealt with the question of what constitutes business versus nonbusiness income under UDITPA (Article IV of the Compact) do not disagree with the Commission's regulations because they generally hold that all income which a taxpayer derives from its integrated unitary business operations constitutes business income if the income arises out of activities, or is used, in the regular course of business. See, for example, *Champion International Corp. v. Bureau of Revenue*, 88 N.M. 411, 540 P.2d 1300 (1975), and *Sperry & Hutchinson v. Department of Revenue*, 270 Or. 329, 527 P.2d 729 (1974).

3. The Appellants erroneously argue that the Commission has adopted rules and practices for combined reporting (Appellants' Br. 12, 25-26) and that this interferes with the national interest in the conduct of foreign affairs (Appellants' Br. 35-42 and the sovereignty and revenue policies of nonmember states (Appellants' Br. 45).

The Appellants advance the argument that the Commission has adopted rules and practices on worldwide combination which are contrary to international practice, United States treaty commitments, and federal principles, and have provoked complaints from many of our treaty partners (Appellants' Br. 12-13) and thus interferes with foreign affairs (Appellants' Br. 32-35). Since the Commission has no power to fix or determine the tax liability of any taxpayer for any state on any basis whatsoever; since the Commission has adopted no combined reporting rules and has no uniform practice in regard to combined reporting (either domestic or worldwide); and since there is no international practice or established federal policy concerning worldwide combination for state tax purposes, the Appellants' argument concerning the Compact's alleged interference with national or international affairs is in error.

No treaty which has been ratified by the Senate forbids any state from determining the income of a multinational corporation by application of worldwide combination principles. Thus, there is no conflict between federal treaties and worldwide com-

bination. If there were, the treaty provisions would control. The only regulations issued by the Commission are those pertaining to the division of income under Article IV of the Compact (UDITPA) which do not provide for "combined reporting."[28]

[28]If the Appellants were correct in their contention, which they weave throughout their argument pertaining to the "congressional consent" question, that the Commission has adopted rules and regulations pertaining to the "combined reporting" and "unitary" concepts, we fail to see how this would invalidate the Compact on its face. These are concepts approved by the judiciary and indeed found to be necessary to properly apportion the income of multistate-multinational corporations to the respective states. See *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920); *Bass, Ratcliff & Gretton v. State Tax Commission*, 266 U.S. 271 (1924); and *Butler Bros. v. McColgan*, 17 Cal. 2d 664, 111 P.2d 334, aff'd 315 U.S. 501 (1942); *Edison California Stores v. McColgan*, 30 Cal.2d 472, 183 P.2d 16 (1947); *Superior Oil Company v. Franchise Tax Board*, 34 Cal. Rptr. 545, 386 P.2d 33 (1963). For a recent discussion on "combined reporting" see Frank M. Keesling, "A Current Look at the Combined Report and Uniformity in Allocation Practices" 42 *Journal of Taxation* 106 (Feb. 1975). Cf. "Multinational Corporations and Income Allocation under Section 482 of the Internal Revenue Code," 89 Harvard L. Rev. 1202.

If Corporation A manufactures a product which it sells to a sales subsidiary Corporation B and Corporation A and B are so interrelated in their business affairs that the separate profits of Corporation A cannot be determined apart from Corporation B and vice versa, it is perfectly logical and necessary to combine Corporation A and B to determine the true income of either Corporation A or Corporation B. Should the results arrived at by this court in *Bass, Ratcliff & Gretton v. State Tax Commission*, 266 U.S. 271 (1924) be any different if the brewing of ale in England was by a parent and its activities in New York were conducted by a subsidiary corporation?

The Indiana Survey (footnote 24, Supplement A, asks the following question: "Are there any situations in which your state goes beyond the corporate shell to consider the unitary corporate business in determining the income tax base? (That is, are there any situations in which your state takes into consideration activities of related corporations in determining the income tax of a corporate taxpayer?)" This survey indicates that 31 states answered the question "yes," including eastern states such as New York and the District of Columbia.

The only question in "combined reporting" is whether or not tax consequences should be different if a unitary trade or business is carried on under one corporate umbrella or several corporate umbrellas. Compare *Butler Bros. v. McColgan, supra* with *Edison California Stores v. McColgan, supra*.

The report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary House of Representatives in House Report No. 952, 89th Cong. 1st Sess., at page 1154, noted that:

> "Often corporations which are controlled directly or indirectly by the same interests are so mutually dependent on each other for their success that the books of an individual corporation cannot accurately reflect the corporation's contribution to the profitability of the entire multicorporate enterprise."

It then recommended at page 1155 of the same report that:

> "State tax administrators be allowed to require consolidation in any case where two or more corporations are affiliated by common ties of more than 50 percent of stock ownership and at least one of the affiliates has realty or an employee in the State."

In reference to combined reporting these regulations only provide:

> "If a particular trade or business is carried on by a taxpayer and one or more affiliated corporations, nothing in Article IV or in these regulations shall preclude the use of a 'combined report' whereby the entire business income of such trade or business is apportioned in accordance with Article IV.9. to Article IV.17."[29]

Neither has the Commission adopted any particular practice in regard to combined reporting. In conducting joint audits for member states, the Commission auditors audit in accordance with the guidelines given to them by the tax officials of the member states. If a member state requests that an audit be prepared in accordance with the combined method of reporting (either domestic or worldwide), this method is employed by the Commission auditors for that state. On the other hand, if a member state requests that the Commission auditors furnish it information on the basis of separate accounting or the unitary concept without combined reporting, the Commission auditors follow such guidelines.[30]

If administration of the Compact were at issue (which it is not), it is thus clear that administration

[29]Seventh Annual Report of the Multistate Tax Commission (1974), p. 69, Reg. IV.2.(b)(2).

[30]Appellants state, "During Appellants' limited discovery, it was determined that the combined reporting and full apportionment rules of the Commission have been applied in dozens of multistate and multinational audits, involving large sums of money and as many as eleven states at one time." (Appellants Br. 28-29) What Appellants

of the Compact by the Commission in regard to "combined reporting" does not interfere with the national interest in foreign affairs or the sovereign and revenue policies of nonmember states.

4. **Though totally irrelevant, Appellants erroneously argue that "combined reporting" is not a valid workable concept for the division of income.**

Appellants spend considerable effort in their brief to convince this Court that combined reporting is a bad and unworkable concept (Appellants' Br. 36-37, 41-43, 45).[31] But, this Court has already overruled such a contention in regard to the unitary concept. *Butler Bros. v. McColgan, supra*, 315 U.S. 501 (1941). Combined reporting is simply the application of the unitary concept to determine the income tax liability of a taxpayer whose business operations are so integrated with affiliated corporations that both the taxpayer and affiliated corporations have to be treated as an economic unit for division of income tax purposes. This application of the unitary concept is directed to the problem noted

fail to reveal is that items of income were specifically allocated for some states and liability was determined for other states on the basis of separate accounting or the unitary concept without combination.

[31]Appellants fail to discuss problems associated with the "arms-length" concept employed in Section 482 of the Internal Revenue Code. A law review note entitled, "Multistate Corporations and Income Allocation Under Section 482 of the Internal Revenue Code," 89 Harv. L. Rev. 1202, *supra*, contains an in-depth discussion of the Section 482 approach (separate accounting) as compared to the combined reporting (unitary) approach to the division of income problems. This article belies the simplistic approach Appellants use in their Brief to discuss these questions. Furthermore, as indicated in the law review note, Section 482 adjustments and combined reporting are simply different methods to determine what income of a multinational corporation is properly attributable to United States sources. The note further indicates that in actual practice, the Internal Revenue Service and the Courts have resorted to "combination" or unity concepts in applying Section 482 of the Internal Revenue Code.

by this Court in *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 133 (1920);

> "The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut and ending with sales in another state * * * The legislature, in attempting to put upon this business its fair share of the burden of taxation, was faced with the impossibility of allocating specifically the profits earned by the processes conducted in its borders." (254 U.S. 120, 121)[32]

But whether or not combined reporting is good or bad is totally irrelevant.[33] The fact that the Commission staff believes it to be a valid and workable concept for the attribution of income and some member states have adopted combined reporting as a matter of state policy has nothing to do with the validity of the Compact. If the states insist on its use and the federal government believes that it conflicts with federal policy, the federal government has ample power to deal with this question.

[32]The need for "combined reporting" under this test, on the international level, can be illustrated by an actual example of a multinational corporation conducting unitary operations in Canada and Idaho through two subsidiary corporations. The Canadian subsidiary processes pulp used for the manufacture of paper by the American subsidiary. The pulp is transported from the Canadian subsidiary to the American subsidiary by a pipeline crossing international boundaries. Under these circumstances, it is impossible to separate the profits of the Canadian subsidiary from that of the American subsidiary because the profits of the two corporations from the manufacture of pulp and paper products were earned by a series of transactions beginning in Canada and ending in sales in Idaho. Thus, logic dictates that "combined reporting" be utilized to determine the profits of either of these two subsidiaries.

[33]Appellants on page 38 of their Brief infer that the proposed United States-United Kingdom Tax Treaty prevents worldwide combination by the states. It does so only in regard to United States subsidiaries of foreign United Kingdom parent corporations. It does not prevent worldwide combination of a domestic United States parent with its worldwide affiliated corporations. No audit conducted by the Commission on behalf of any member state has combined the income of a foreign parent with a domestic subsidiary. Furthermore,

D. **The Appellants' argument that the Compact has a serious impact on and burdens interstate commerce (Appellants' Br. 42-44, 48) and interferes with the sovereignty and revenue policies of the nonmember states (Appellants' Br. 45-47) erroneously attributes nonuniformity to the Compact and constitutes a rehash of Appellants' erroneous arguments concerning "combined reporting" and "full apportionment of nonbusiness income."**

In arguing that the Compact has a serious impact on or burdens interstate commerce (Appellants' Br. 42-45, 48), Appellants assert that the unitary concept and the apportionment of nonbusiness income subjects interstate businesses to burdensome multiple taxation and interferes with the national interest in promoting low-cost efficient interstate business.

This argument of Appellants is replete with many invalid assumptions. As heretofore indicated the Compact has nothing to do with the subject matter of combined reporting (See *supra*, p. 62) and the Commission has issued no rules and has adopted no uniform practice concerning combined reporting (See *supra*, pp. 69-72). Furthermore, as heretofore indicated, Article IV of the Compact (UDITPA) specifically provides for the allocation of nonbusiness income as do the rules and regulations of the Commission (See *supra*, p. 67). Since the only provision of the Compact that has anything

this treaty establishes no federal principle or treaty commitment until ratified by the United States Senate.

to do with this argument of Appellant is the language of UDITPA (Article IV of the Compact), unless the adoption of the uniform UDITPA language by the states (members and nonmembers of the Compact) interferes with the national interest in promoting interstate commerce, there is absolutely no validity to or factual or legal support for Appellants' commerce clause argument. Obviously, the adoption of uniform legislation promotes rather than interferes with interstate commerce.

The fact that the Compact has achieved significant uniformity in the field of state and local taxation of multistate businesses and thus promotes interstate commerce is also borne out by the Indiana survey. This survey, appended as Supplement A to this brief, shows startling results. This survey was conducted to determine what progress the states have made in the last ten years (the life of the Compact) toward uniformity and state taxation of multistate businesses. While it cannot be ascertained what role the Compact standing alone played in this progress toward uniformity, the Compact undoubtedly had a significant role. In light of these results and the uniformity inherent in the Compact itself, Appellants' assertion that the Compact and Commission produce confusion, inefficiency, inconsistent tax determination and multiple taxation (Appellants' Br. 13-14) is totally unfounded.[34]

[34]This assertion of Appellants is completely unsupported by the record and is immaterial since taxpayers have no constitutional rights under the commerce clause to be protected from these alleged results. Furthermore, this argument of Appellants is inconsistent with its assertion that the Compact is transforming state taxation of multistate businesses. (Jur. St. App. A. 14a)

It is therefore respectfully submitted that the Compact promotes the national interest under the commerce clause and does not interfere with or burden interstate commerce.

Neither does the adoption of uniform legislation in the Compact interfere with the sovereignty and revenue policies of nonmember states. No provision of the Compact or action of the Commission precludes other states from adopting any revenue policies consistent with their own laws and constitutional guidelines.[35]

E. **The Appellees' Response to Miscellaneous Arguments and Misstatements of the Appellants.**

We have heretofore dealt with the major themes of the Appellants' argument indicating why, in our opinion, they have nothing to do with the validity of the Compact on its face and generally with the operations of the Compact by the Commission. Furthermore, we have pointed out some of the misstatements, erroneous conclusions and conjectures on which these major themes are based. By a few examples, we wish to further demonstrate here the conclusionary, conjectural and erroneous nature of the Appellants argument.

The Appellants depict the Commission as an

[35]The Appellants' argument that the Compact interferes with the sovereignty and revenue policies of nonmember states is refuted by the Thirteenth Resolution of the National Association of Tax Administrators at its Forty-Fifth Annual meeting at Williamsburg, Virginia, on June 3, 1977, wherein NATA resolved without dissent:

"* * * that the National Association of Tax Administrators does not believe, that as a matter of policy in its present form the Multistate Tax Compact interferes with the sovereignty and the revenue policies of the nonmember states."

independent commission or body (Appellants' Br. 12-12, 14, 20, 30, 32, 34). Appellants never explain what they mean by "independent." The Commission is simply composed of the tax administrators of the member states and does not operate independently of those states. The Commission confers no power upon them. Any power they exercise as a result of participation in the deliberations and recommendations of the Commission is the power they derive as being the tax administrators of their respective states. It is highly misleading for the Appellants to attribute any independent power to the Commission or to refer to it as an independent body when that is squarely in conflict with the Compact. The Commission, in order to accomplish anything, is completely dependent upon subsequent action by the states. It is individual state action and not the Compact or Commission, which is the subject matter of Appellants' complaints.

On pages 28 and 30 of their Brief, the Appellants infer that the Commission has a large staff to carry out its work "with more staff and greater powers than many of the commissions subjected to congressional review." The Commission staff at the time this litigation started consisted of an executive director, clerical staff in the Boulder office and three auditors. It has since added six auditors (three of those in the last six months) and one attorney. There is absolutely no support in the Appellants' Brief or record in this cause that such staff is larger than or that the Commission has greater powers than

many of the commissions subjected to congressional review.

Contrary to Appellants' assertions throughout their Brief, the staff personnel are not the Compact nor its Commission. They do not establish the advisory policies or recommendations of the Commission. It is thus error for the Appellants to refer to statements of the staff as representing the policy of the Commission or that they have anything to do with Compact. For example, the Commission staff's statements referred to on page 25 of Appellants' Brief, footnote 40, do not constitute a policy of the Commission or a statement of its practices.

Further, the Appellants in their Brief take staff statements out of context and cite them in support of statements in the Brief which they do not support. For example, Appellants assert:

> "But the Commission has adopted rules and practices calling for full apportionment of the non-business income of multistate and multinational taxpayers."

and cite in support thereof the statement of the Executive Director of the Commission pertaining to full apportionment on page 47 of the Commission's Seventh Annual Report (1974) (Appellants' Br. 27). The quoted statement is from a paper entitled, "Attribution of Corporate Income Among Different Jurisdictions for Tax Purposes" which did not discuss the rules or practices of the Commission.

As a further example, Appellants misrepresent the facts by asserting that Commission representatives have indicated that the Commission's UDITPA regulations are inconsistent with UDITPA (Appellants' Br. 48). In support of this statement, they cite the law review article written by the Commission's general counsel entitled, "Taxation of Income from Intangibles to Multistate-Multinational Corporations," 29 Vand. L. Rev. 401 (1976). The Commission's general counsel did not discuss the validity of these regulations in that article.

In other portions of the Appellants' Brief, the Appellants refer to matters that have nothing to do with the Compact, its operations or its staff. For example, on pages 37-38 and 40-41 of the Appellants' Brief, Appellants discuss the "permanent establishment" jurisdictional test which they erroneously commingle and confuse with the "arms length" standard of Section 482 of the Internal Revenue Code.

The "permanent establishment" jurisdictional standard has absolutely nothing to do with the Compact or any activity whatsoever of the Commission or its staff. The Compact does not contain any jurisdictional standards for imposition of any state or local taxes.

The deceptive nature of the Appellants' argument is illustrated by the Appellants' reference on page 40 of their brief to the Report of the Task

Force on Foreign Source Income of the House Committee on Ways and Means. They there infer that the report discusses the Compact in conjunction with the unitary business concept. That report does not tie the Compact to the unitary concept and only mentions the Compact in passing.

It would serve little purpose here to analyze further the lack of logic or support for the "argument" contained in the Appellants' Brief. This argument is full of misstatements and conjecture which have nothing to do with the validity of the Compact on its face or its administration. It should be ignored by this Court in resolving the questions at issue.

VI

CONCLUSION

The Appellants in their Amended Complaint (A. 2-10) ask that the Compact be declared invalid on its face and that its Commission be disbanded because they erroneously assert (1) the Compact is invalid without congressional consent; and (2) the Compact contravenes commerce clause limitations and denies Appellants Fourteenth Amendment and Fourth Amendment guarantees under the Constitution of the United States. Since the compact legislation of the member states is presumed to be constitutional, and since the Compact contains a severability clause, the Appellants have the burden to demonstrate to this Court what provisions, if any, of the Compact contravene these constitutional limitations.

The three-judge court below carefully analyzed

the issues raised in the Amended Complaint and held the Compact valid in all respects. (Jur. St. App. A, 1a-21)

The basic issues raised by Appellants on appeal are (1) whether the *Virginia v. Tennessee* test correctly sets forth the standard for determining when congressional consent is required for any compact or agreement among the states; and (2) whether the Compact is valid under this test. Appellants would limit the application of the *Virginia v. Tennessee* test to boundary agreements or dicta (Appellants' Br. 12) and assert that it has no application to what they term "modern complex compacts" (Appellants' Br. 34).

In regard to their argument that the *Virginia v. Tennessee* test is limited to boundary disputes or is dicta, decisions of this Court and other courts, as well as congressional consideration, have never so limited its application. It is thus apparent that the *Virginia v. Tennessee* test has been given much wider application than that contended for by Appellants. This is not surprising inasmuch as the *Virginia v. Tennessee* test involves a fundamental and timeless understanding of the proper relationship between the Nation and the states. It was evolved to reconcile the powers delegated to the federal government under the Constitution of the United States with the powers reserved to the states under that document. It has stood the test of time and to our knowledge has been consistently applied in all the

congressional consent compact cases and otherwise. Appellants have set forth no reasons in their brief why this Court should now abandon that test.

Wherefore, it is respectfully submitted that this Court affirm the judgment of the three-judge district court below.

Respectfully submitted,

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SUPPLEMENT A
RESULTS OF A SURVEY ON THE UNIFORMITY OF STATE LAWS BY THE STATE OF INDIANA
(February 15, 1977)

Summary

A questionnaire on the degree of uniformity of tax law among the states was sent in October 1976 to all fifty states and the District of Columbia. A one hundred per cent response rate was achieved, although not until nearly three months after the original request for information—causing a slight delay in the original timetable for compilation of the results. The data presented here is based on representations made by the states in response to the questionnaire itself as well as to follow-up telephone conversations.

The results of the survey were very encouraging. We believe that on the basis of the information assembled it is reasonable to conclude that the present degree of uniformity, with respect to sales, use, and corporate income (or franchise) taxes, is considerable. Furthermore, it does appear that there has been a substantial increase in uniformity over the last decade.

All states with corporate income taxes, for example, now use some sort of mathematical formula to determine what corporate income is to be attributed where. Most but not all states also did so ten years ago. But twice as many states (25) as ten years ago now have adopted the Uniform Division of In-

come for Tax Purposes Act (UDITPA) without significant modification or revision. More importantly, only six of those states with corporate income taxes now employ an apportionment formula *not* substantially similar to an equally-weighted three factor formula. In other words, 39 of 45 states use an equally-weighted three factor formula—indeed persuasive evidence of uniformity among the states. And two other states have tax laws substantially in accord with UDITPA, except that one has eliminated the sales factor while the other gives it double weight.

Perhaps of even greater significance, however, is the evidence that considerable uniformity now exists with respect to the interpretation of tax laws. The results of this survey indicate that *eighteen* states now use regulations interpreting UDITPA which substantially conform with those proposed by the Multistate Tax Commission.

Most of our other findings corroborate this conclusion of substantial and increased uniformity among the states:

Corporate income (or franchise) taxes

Most states (38) distinguish between income subject to allocation and income subject to apportionment; most of those states (28) employ a "business/non-business" criterion to make that distinction.

Most states (31) now include dividends in the apportionment base under some circumstances.

Most states (31) consider the unitary corporate business in determining the income base, at least in some situations.

Thirty-eight states admit to sharing income tax information with other states or organizations.

Most states (36) use federal taxable income in determining the tax base; only 20 did so ten years ago.

Forty-two states allow the federal asset depreciation range, while only 29 did so ten years ago.

Fifteen states assign audits to an outside organization or participate in cooperative audits (all are full voting members of the Multistate Tax Commission); no states did so ten years ago.

Sixteen states now require corporations to account for all out-of-state sales, property, and payroll on a state-by-state basis, either by return or audit—more than double the number that did so ten years ago.

Sales and use taxes

Most states (42) allow credit against use tax liability on purchases other than vehicles for sales tax due and paid in other states; only 32 states did so ten years ago.

Thirty-five states accept the Uniform Sales and Use Tax Exemption Certificate sponsored by the Multistate Tax Commission. No such certificate existed ten years ago.

Twenty-three states recognize and comply with the Uniform Sales and Use Tax Jurisdictional standard of the Multistate Tax Commission. No such standard existed ten years ago.

Twenty-eight states furnish information to

otherd states regarding out-of-state purchasers who claim exemption from sales tax in those states.

The questions and the compiled information follow. The answers to open-ended questions have not been compiled because of major differences among the states in the quality of responses.

1(A). Does your state use a mathematical formula to determine what income of a corporate business is to be attributed to your state for tax purposes?
YES: 45 NO: 0 N/A: 6

1(B). Had it done so 10 years ago?
YES: 35 NO: 2 N/A: 13

2(A). Has your state enacted UDITPA (The Uniform Division of Income for Tax Purposes Act) without significant modification or revision?
YES: 25 NO: 20 N/A: 6

2(B). Had it done so 10 years ago?
YES: 12 NO: 26 N/A: 13

3(A). Has your state adopted regulations interpreting UDITPA which substantially conform with those proposed by the Multistate Tax Commission (first proposed September 1971, revised February 1973)?
YES: 18 NO: 8 N/A: 25

3(B). If so, when did your state adopt these regulations? (First proposed September 1971, revised February 1973)

4(A). If your state has not enacted UDITPA, is its apportionment formula substantially similar to a formula employing the equally-weighted factors of sales, property, and payroll?
YES: 14 NO: 6 N/A: 31

4(C). When did your state adopt this formula?

TABLE I

State	1A	1B	2A	2B	3A	3B	4A	4C
Alabama	YES	YES	YES[1]	NO	YES[1]	1974	N/A	N/A
Alaska	YES	YES	YES	YES	YES	1972	N/A	N/A
Arizona	YES	YES	NO	NO	N/A	N/A	YES[2]	1954
Arkansas	YES	YES	YES	YES	YES	1974	N/A	N/A
California	YES	YES	YES	YES	YES	1972	N/A	N/A
Colorado	YES	YES	YES	NO	YES	1976[3]	N/A	N/A
Connecticut	YES	YES	NO	NO	N/A	N/A	YES[4]	1967
Delaware	YES	YES	NO	NO	N/A	N/A	YES[5]	1958
District of Columbia	YES	YES	YES	YES	NO	N/A	N/A	N/A
Florida	YES	N/A[6]	NO	N/A[6]	N/A	N/A	NO[7]	1971
Georgia	YES	YES	NO	NO	N/A	N/A	YES[8]	1968
Hawaii	YES	YES	YES	NO	NO	N/A	N/A	N/A
Idaho	YES	YES	YES	YES	YES	1973	N/A	N/A
Illinois	YES	N/A[9]	YES	N/A[9]	NO	N/A	N/A	N/A
Indiana	YES	YES	YES	YES	YES	1972	N/A	N/A
Iowa	YES	YES	NO	NO	N/A	N/A	NO	1934
Kansas	YES	YES	YES	YES	YES[10]	N/A	N/A	N/A
Kentucky	YES	YES	YES	YES[11]	YES	1971	N/A	N/A
Louisiana	YES[12]	YES	NO	NO	N/A	N/A	YES[13]	1948
Maine	YES	N/A[14]	YES	N/A[14]	YES	1976	N/A	N/A
Maryland	YES	YES	NO	NO	N/A	N/A	YES[15]	1939
Massachusetts	YES	YES	NO	NO	N/A	N/A	NO	1975
Michigan	N/A[16]	N/A[16]	N/A[17]	N/A	N/A	N/A	N/A	N/A
Minnesota	YES	YES	NO	NO	N/A	N/A	YES[18]	1939
Mississippi	YES	YES	NO	NO	N/A	N/A	YES[19]	1954

TABLE I—Continued

State	1A	1B	2A	2B	3A	3B	4A	4C
Missouri	YES	YES	YES	NO	YES	1975	N/A	N/A
Montana	YES	YES	YES	NO[20]	YES	1976	N/A	N/A
Nebraska	YES	N/A[21]	YES	N/A	YES	1974	N/A	N/A
Nevada	N/A[22]	N/A	N/A	N/A	N/A	N/A	N/A	N/A
New Hampshire	YES	N/A[23]	NO[24]	N/A	N/A	N/A	YES[24]	1969
New Jersey	YES	YES	NO	NO	N/A	N/A	YES[25]	1946
New Mexico	YES	NO	YES	NO[26]	YES	1973	N/A	N/A
New York	YES	YES	NO	NO	N/A	N/A	NO	1975
North Carolina	YES	YES	YES	NO[27]	YES[28]	N/A	N/A	N/A
North Dakota	YES	YES	YES	YES	YES	1972	N/A	N/A
Ohio	YES	N/A[29]	NO[29]	N/A[29]	N/A	N/A	YES[29]	1971[29]
Oklahoma	YES	NO	NO	NO	N/A	N/A	YES[30]	1941
Oregon	YES	YES	YES	YES	YES	1971	N/A	N/A
Pennsylvania	YES	YES	YES[31]	NO[32]	NO[33]	N/A	N/A	N/A
Rhode Island	YES	YES	NO[34]	NO	N/A	N/A	YES[34]	1947
South Carolina	YES	YES	YES[35]	YES	NO	N/A	N/A	N/A
South Dakota	N/A[36]	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Tennessee	YES	YES	YES[37]	NO	NO[38]	N/A	N/A	N/A
Texas	N/A[39]	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Utah	YES	YES	YES	NO[40]	YES	1972	N/A	N/A
Vermont	YES	YES	NO	NO	N/A	N/A	YES[41]	1966
Virginia	YES	YES	YES[42]	YES	NO	N/A	N/A	N/A
Washington	N/A[43]	N/A	N/A	N/A	N/A	N/A	N/A	N/A
West Virginia	YES	N/A[44]	NO[45]	N/A	NO[46]	N/A	NO[45]	1967
Wisconsin	YES	YES	NO	NO	N/A	N/A	NO	1971
Wyoming	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

FOOTNOTES—TABLE I

[1]Alabama's corporate income tax statute is vague on how the state is to determine what portion of a corporation's income is to be attributed to the state for tax purposes. On September 6, 1967, the Alabama Legislature enacted the Multistate Tax Compact, which includes UDITPA, subject to congressional enactment of a Multistate Tax Compact Consent Bill. On September 12, 1967, the Alabama Department of Revenue promulgated regulations which adopt the UDITPA provisions as the basis on which to determine the amount of a corporation's income which is attributable to a state. Subsequently, Alabama has also substantially adopted the regulations interpreting UDITPA proposed by the Multistate Tax Commission.

[2]While Arizona does allow use of an equally-weighted three factor formula, it also permits formulas employing more factors, or various combinations of factors. Arizona law mentions the separate accounting method first, and assigns taxing officials considerably more discretionary power than does UDITPA.

[3]Colorado has been using the MTC regulations unofficially since 1973. They were officially adopted as of October 15, 1976.

[4]Connecticut's law differs from UDITPA in that its property factor is based on average net book value. Connecticut also attributes all sales to the state of destination.

[5]There are numerous differences between UDITPA and the Delaware tax formula.

[6]Florida enacted its corporate income tax in 1971.

[7]Florida's corporate income tax is substantially in accord with UDITPA, the major difference being a double-weighting of the sales factor by Florida.

[8]Georgia is sometimes considered to be a UDITPA state, but its payroll and sales factors are substantially different.

[9]The Illinois Income Tax Act was not enacted until 1969.

[10]The regulations proposed by the Multistate Tax Commission are generally followed by Kansas, but have not been formally adopted.

[11]Kentucky adopted UDITPA in 1966, effective in 1967.

[12]Louisiana provides two methods for determining Louisiana net income, the apportionment method and the separate accounting method. A mathematical formula is used under the apportionment method.

[13]There are numerous differences between UDITPA and Louisiana's apportionment formula.

[14]Maine enacted its corporate income tax law in 1969.

[15]Maryland's apportionment formula differs significantly from UDITPA in that sales are attributable to the state where secured or negotiated, a feature that could result in double taxation.

[16]Michigan does not now have a corporate income tax. In 1976 its corporate income tax was replaced by a "Single Business Tax,"

FOOTNOTES—TABLE I—Continued

which does not use corporate income as a taxable base. Michigan's corporate income tax was originally enacted in 1967.

[17]Michigan was a UDITPA state, while it had a corporate income tax.

[18]Minnesota allows an equally-weighted three factor formula, but it also provides for weighted factors, single factor formulas, and the separate accounting method in some cases.

[19]Mississippi uses three factors, but the property factor is limited to manufacturing or selling assets, the labor factor to manufacturing or selling payrolls and sales are assigned to the state in which the sale is actually consummated.

[20]UDITPA was adopted into Montana regulations on January 1, 1967. It subsequently became a part of Montana statutes for years ended on or after December 31, 1973.

[21]Nebraska adopted UDITPA in October 1967.

[22]Nevada has no corporate income tax.

[23]New Hampshire had no corporate income tax prior to its Business Profits Tax, effective January 1, 1970.

[24]New Hampshire does not allocate any of the income of a corporation. It is sometimes considered a UDITPA state, as its formula is not substantially different.

[25]There are numerous differences between UDITPA and New Jersey's apportionment formula. The three factor formula has been used since 1946 in determining New Jersey's tax base. Changes have been made in the formula for the allocation of receipts, with the other factor formulas remaining the same. The present formula was adopted in 1967.

[26]UDITPA became effective in New Mexico on January 1, 1967.

[27]North Carolina enacted UDITPA in 1967.

[28]North Carolina has adopted regulations proposed by the National Association of Tax Administrators (NATA), which are substantially similar to those proposed by the Multistate Tax Commission.

[29]Ohio adopted an income base for its corporate franchise tax in 1971. The alternative base, Ohio net book worth, was adopted in 1902. The apportionment of the net income base generally follows UDITPA.

[30]Oklahoma's law is similar to UDITPA in several respects, enough so that it is sometimes considered a UDITPA state.

[31]Pennsylvania departs from UDITPA in that its statutes contain a provision for sales to be attributed to the state of destination. As an administrative rule, however, Pennsylvania utilizes the "Throw out Rule" (that is, sales into non-nexus states are thrown out of both the numerator and the denominator of the formula) when the sales factor is deemed to be disproportionate to the property and/or payroll factor percentages.

[32]Pennsylvania's present corporate tax was adopted in 1971.

FOOTNOTES—TABLE I—Continued

[33]Pennsylvania's adopted and proposed regulations have used the MTC's proposed regulations as a reference. These regulations have been adopted and proposed piecemeal since 1975.

[34]Rhode Island does not allocate any corporate income; all income is apportioned by the three factor formula. All sales are attributed to the state of destination.

[35]South Carolina employs the throwback rule for sales into states without a corporate income tax, as well as for sales into states in which the seller lacks situs.

[36]South Dakota has no corporate income tax.

[37]Tennessee has slightly modified the sales factor to include sales on a destination basis only, as contrasted with UDITPA, which employs a "throwback" rule for sales not taxable in another state.

[38]Tennessee has indicated that the MTC regulations will be proposed for adoption in that state.

[39]Texas has no corporate income tax.

[40]Utah enacted UDITPA January 1, 1967.

[41]Vermont is not considered a UDITPA state primarily because it apportions sales on an origin basis—a significant departure from UDITPA which could result in double taxation of out-of-state sales.

[42]There are several minor differences between UDITPA and Virginia's corporate income tax. Nevertheless, Virginia is widely regarded as a UDITPA state. The major difference is that Virginia does not use the "business/non-business" criterion for distinguishing between allocable and apportionable income.

[43]Washington has no corporate income tax.

[44]West Virginia's Corporate Net Income Tax was established in 1967.

[45]West Virginia has adopted the MTC regulations in part.

[46]West Virginia's formula is substantially similar to UDITPA, but it has eliminated the sales factor, leaving a two factor formula.

6(A). Does your state distinguish between income subject to apportionment by formula and income subject to apportionment by allocation in determining where corporate income is to be attributed for tax purposes?
YES: 38 NO: 7 N/A: 6

(B). If so, what is the basis for the distinction, i.e., what are the criteria for determining

whether income is allocable or apportionable?
Primarily a business/non-business distinction (B/NB): 28
Primarily a criterion other than business/non-business: 10
N/A: 13

7(A). Does your state (ever) include dividends in the apportionment base?
YES: 31 NO: 14 N/A: 6

8(A). Are there any situations in which your state goes beyond the corporate shell to consider the unitary corporate business in determining the income tax base? (That is, are there any situations in which your state takes into consideration activities of related corporations in determining the income tax of a corporate taxpayer?)
YES: 31 NO: 14 N/A: 6

9(A). Do you (ever) require corporations to account for all out-of-state sales, property, and payroll on a state-by-state basis (either by return or during audits)?
YES: 16 NO: 29 N/A: 6

(B). Did you do so ten years ago?
YES: 7 NO: 31 N/A: 13

TABLE II

State	6A	6B	7A	8A	9A	9B
Alabama	YES	B/NB	YES	NO	NO	NO
Alaska	YES	B/NB	YES	YES	YES	NO
Arizona	YES	OTHER	YES[1]	NO	NO	NO
Arkansas	YES	B/NB	YES	NO	YES	NO
California	YES	B/NB	YES	YES	YES	YES
Colorado	YES	B/NB[2]	YES[3]	YES	YES	NO
Connecticut	YES	B/NB	YES	NO	NO	NO
Delaware	YES	OTHER	NO	NO	NO	NO
District of Columbia	YES	B/NB	NO	YES	NO	NO
Florida	NO	N/A	NO	YES	NO	N/A[4]
Georgia	YES	OTHER	NO	YES	YES	YES
Hawaii	YES	B/NB	NO	NO	NO	NO
Idaho	YES	B/NB	YES	YES	NO	NO
Illinois	YES	B/NB	YES	NO[5]	NO	N/A[6]
Indiana	YES	B/NB	YES	YES	YES	YES
Iowa	YES	B/NB	YES	YES	YES[7]	NO
Kansas	YES	B/NB	YES	YES	YES	YES
Kentucky	YES	B/NB	NO	YES	YES	YES
Louisiana	YES	OTHER	NO	YES	NO	NO
Maine	YES	B/NB	YES	YES	NO	N/A[8]
Maryland	YES	OTHER[9]	YES	NO	YES	YES
Massachusetts	NO	N/A	YES	YES	NO	NO
Michigan	N/A	N/A	N/A	N/A	N/A	N/A
Minnesota	YES	B/NB	YES	YES	NO	NO
Mississippi	YES	B/NB	NO	YES	NO	NO

TABLE II—Continued

State	6A	6B	7A	8A	9A	9B
Missouri	YES	B/NB	YES	YES	YES	NO
Montana	YES	B/NB	YES	YES	YES	YES
Nebraska	YES	B/NB	YES	YES	NO	N/A[10]
Nevada	N/A	N/A	N/A	N/A	N/A	N/A
New Hampshire	NO	N/A	YES	NO[11]	YES	N/A[12]
New Jersey	NO	N/A	YES	NO	NO	NO
New Mexico	YES	B/NB	YES	YES	YES	NO
New York	NO	N/A	YES	YES	NO	NO
North Carolina	YES	B/NB	YES	YES	NO	NO
North Dakota	YES	B/NB	YES	YES	YES	NO
Ohio	YES	OTHER	NO	YES	NO	N/A[13]
Oklahoma	YES	OTHER	NO	YES	NO	NO
Oregon	YES	B/NB	YES	YES	NO	NO
Pennsylvania	YES	B/NB	NO	NO	NO	NO
Rhode Island	NO	N/A	NO	NO	NO	NO
South Carolina	YES	OTHER	NO	NO	NO	NO
South Dakota	N/A	N/A	N/A	N/A	N/A	N/A
Tennessee	YES	B/NB	YES[14]	YES	NO	NO
Texas	N/A	N/A	N/A	N/A	N/A	N/A
Utah	YES	B/NB	YES	YES	NO	NO
Vermont	NO	N/A	NO	NO	NO	NO
Virginia	YES	OTHER	YES	YES	YES	NO
Washington	N/A	N/A	N/A	N/A	N/A	N/A
West Virginia	YES	B/NB	YES	YES	NO	N/A[15]
Wisconsin	YES	OTHER[16]	YES	YES[17]	NO	NO
Wyoming	N/A	N/A	N/A	N/A	N/A	N/A

FOOTNOTES—TABLE II

[1]Dividends are included in the apportionment base only to the extent that they exceed interest expense.

[2]Colorado also permits corporations to use a two factor formula, sales and property. The two factor formula uses criteria other than the "business/non-business" distinction to determine whether income is allocable or apportionable.

[3]If dividends are business income, they will be included in the apportionment base of Colorado's three factor formula (UDITPA). Colorado's two factor formula, however, directly allocates dividends.

[4]Florida enacted its corporate income tax in 1971.

[5]Illinois previously used the unitary or combined method of apportionment in appropriate circumstances for taxable years ended prior to November 1, 1975.

[6]Illinois enacted its corporate income tax in 1969.

[7]Corporations are required to account only for all out-of-state sales on a state-by-state basis, since Iowa employs a one factor formula based on sales.

[8]Maine enacted its corporate income tax in 1969.

[9]Maryland uses the "business/non-business" criterion in addition to several other criteria for distinguishing between allocable and apportionable income.

[10]Nebraska enacted its corporate income tax in 1967.

[11]New Hampshire does not consider the unitary corporate business in determining the income tax base. However, possible implementation of such a policy, under certain circumstances, is now under review.

[12]New Hampshire's corporate income tax became effective in 1970.

[13]Ohio adopted income as an alternative base for its corporate franchise tax in 1971.

[14]Tennessee prefers a strict interpretation of UDITPA, and does not go along with the trend of defining as much income as possible as "business" income and thus including it in the apportionment base.

[15]West Virginia did not enact its Corporate Net Income Tax until 1967.

[16]Wisconsin employs the "business/non-business" distinction to a limited extent by allocating rental and royalty from tangible property not directly used in the production of business income. All income from farms, mines, and quarries are allocated to the situs of the property; all other income is apportionable.

[17]Inter-company transactions may be adjusted under provisions of Wisconsin law similar Section 482 of the Internal Revenue Code.

10(A). Do you ever perform an audit for another state or permit another state or outside

party to perform an audit for you; or do you ever cooperate with another state in assigning an audit to an outside party or organization?

YES: 15 NO: 30 N/A: 6

(B). If so, what basis, with whom, and to whom? Assign to the Multistate Tax Commission: 15 (A few of the states who assign audits to the MTC *also* participate in cooperative audits to a limited extent.)
Other: 0 N/A: 36

(C). Did you do so ten years ago?
YES: 0 NO: 38 N/A: 13

11(A). Do you ever share income tax information with other states or corporations?
YES: 38 NO: 7 N/A: 6

TABLE III

State	10A	10B	10C	11A
Alabama	NO	N/A	NO	YES
Alaska	YES	MTC	NO	YES
Arizona	NO	N/A	NO	YES
Arkansas	YES	MTC	NO	YES
California	YES	MTC	NO	YES
Colorado	YES	MTC[1]	NO	YES
Connecticut	NO	N/A	NO	NO
Delaware	NO	N/A	NO	YES
District of Columbia	NO	N/A	NO	YES
Florida	NO	N/A	N/A[2]	YES
Georgia	NO	N/A	NO	NO
Hawaii	YES	MTC	NO	YES
Idaho	YES	MTC[3]	NO	YES
Illinois	NO	N/A	N/A[4]	YES
Indiana	YES	MTC	NO	YES
Iowa	NO	N/A	NO	NO
Kansas	YES	MTC[5]	NO	YES
Kentucky	NO	N/A	NO	YES
Louisiana	NO[6]	N/A	NO	YES
Maine	NO	N/A	N/A[7]	NO
Maryland	NO	N/A	NO	YES
Massachusetts	NO	N/A	NO	YES
Michigan	N/A	N/A	N/A	N/A
Minnesota	NO	N/A	NO	YES
Mississippi	NO	N/A	NO	YES

State	10A	10B	10C	11A
Missouri	YES	MTC	NO	YES
Montana	YES	MTC[8]	NO	YES
Nebraska	YES	MTC[9]	N/A[10]	YES
Nevada	N/A	N/A	N/A	N/A
New Hampshire	NO	N/A	N/A[11]	NO
New Jersey	NO	N/A	NO	NO
New Mexico	YES	MTC	NO	YES
New York	NO	N/A	NO	YES
North Carolina	NO	N/A	NO	YES
North Dakota	YES	MTC[12]	NO	YES
Ohio	NO	N/A	N/A[13]	YES
Oklahoma	NO	N/A	NO	YES
Oregon	YES	MTC	NO	YES
Pennsylvania	NO	N/A	NO	YES
Rhode Island	NO	N/A	NO	YES
South Carolina	NO	N/A	NO	YES
South Dakota	N/A	N/A	N/A	N/A
Tennessee	NO	N/A	NO	YES
Texas	N/A	N/A	N/A	N/A
Utah	YES	MTC	NO	YES
Vermont	NO	N/A	NO	YES
Virginia	NO	N/A	NO	YES
Washington	N/A	N/A	N/A	N/A
West Virginia	NO	N/A	N/A[14]	NO[15]
Wisconsin	NO	N/A	NO	YES
Wyoming	N/A	N/A	N/A	N/A

FOOTNOTES—TABLE III

[1]Colorado law allows it to enter into an agreement with other states for joint audits.

[2]Florida had no corporate income tax ten years ago.

[3]Idaho also joins with other states to perform cooperative audits.

[4]Illinois had no corporate income tax ten years ago.

[5]Kansas also joins with other states to perform cooperative audits.

[6]Louisiana can join with other states to perform cooperative audits.

[7]Maine had no corporate income tax ten years ago.

[8]Montana also joins with other states to perform cooperative audits.

[9]Nebraska also joins with other states to perform cooperative audits.

[10]Nebraska had no corporate income tax ten years ago.

[11]New Hampshire had no corporate income tax ten years ago.

[12]North Dakota also joins with other states to perform cooperative audits.

[13]Ohio had no corporate income tax ten years ago.

[14]West Virginia had no net corporate income tax ten years ago.

[15]West Virginia shares gross income tax information with West Virginia municipalities only.

12(A). Does your state use federal taxable income in determining the income base?

YES: 36 NO: 9 N/A: 6

(B). If so, what line of Form 1120?

Line 28: 15 Line 30: 20 N/A: 15

(C). Did it do so 10 years ago?

YES: 20 NO: 18 N/A: 13

13(A). Does your state allow the federal asset depreciation range?

YES: 42 NO: 3 N/A: 6

(B). If so, when did it start doing so?
(FF indicates that the state followed the federal practice in effect at the time.)

Thirteen states have begun allowing the federal ADR since 1966, including the seven states that have adopted corporate income taxes since then. (In addition, Vermont began allowing the ADR in 1966.)

14. What jurisdictional standards does your state apply which are different from those imposed by the U.S. Constitution and Public Law 86-272 (73 Stat. 555, 15 U.S.C. 381-384) with respect to out-of-state sellers selling into your state?

Few states apply any jurisdictional standards in addition to P.L. 86-272. Some apply standards only very slightly more restrictive than those imposed by the constitution and the federal government. But the response to this survey indicates that no state is attempting to apply standards apparently prohibited by P.L. 272. Several states, however, admit to using a narrow and very strict interpretation of that law as their standard.

The District of Columbia claims exemption from the provisions of P.L. 272 on the grounds that the District is not a state. Under the provisions of their law, they tax all corporations engaged in a trade or business within D.C. or receiving income from sources within D.C. On the sale of tangible personal property, the corporation must have an office, warehouse, or other place of business in the District to be subject to the D.C. Franchise Tax.

15(A). Regarding the sales factor, are all sales attributed to the state of destination, without regard to the seller's business situs in that state?

YES: 15 NO: 29 N/A: 7

(B). If not, on what basis are sales attributed otherwise?
Throwback (rule): 25
Throwout (rule): 1
Origin (only): 3
Destination (only): 15
N/A: 7

TABLE IV

State	12A	12B	12C	13A	13B	15B
Alabama	NO	N/A	NO	YES	FF	Throwback
Alaska	YES	28	YES	YES	FF	Throwback
Arizona	YES	30	YES	YES	1954	Throwback
Arkansas	NO	N/A	NO	YES	FF	Throwback
California	YES	28	YES	NO[1]	N/A	Throwback
Colorado	YES	30	YES	YES	1960	Throwback[2]
Connecticut	YES	28	YES	YES	FF	Destination
Delaware	YES	30	YES	YES	1958	Destination
District of Columbia	NO	N/A	NO	YES	FF	Throwback
Florida	YES	30	N/A[3]	YES	1972	Destination
Georgia	YES	30	NO	YES	1969	Destination
Hawaii	YES	30	YES	YES	FF	Throwback
Idaho	YES	28	YES	YES	FF	Throwback
Illinois	YES	30	N/A[4]	YES	FF	Throwback
Indiana	YES	30	YES	YES	FF	Throwback
Iowa	YES	30	YES	YES	FF	Destination
Kansas	YES	30	YES	YES	FF	Throwback
Kentucky	YES	—[5]	YES	YES	1972	Destination
Louisiana	NO	N/A	NO	YES	c. 1948	Destination
Maine	YES	30	N/A[6]	YES	FF	Throwback
Maryland	YES	30	NO	YES	1968	Origin
Massachusetts	YES	28	YES	YES	FF	Throwback
Michigan	N/A	N/A	N/A	N/A	N/A	N/A
Minnesota	NO	N/A	NO	YES	1971	Destination
Mississippi	NO	N/A	NO	YES	1971	Origin

TABLE IV—Continued

State	12A	12B	12C	13A	13B	15B
Missouri	YES	30	NO	YES	1973	Throwback
Montana	YES	28	YES	YES	FF	Throwback
Nebraska	YES	30	N/A[7]	YES	FF	Throwback
Nevada	N/A	N/A	N/A	N/A	N/A	N/A
New Hampshire	YES	28	N/A	YES	1970	Throwback
New Jersey	YES	28	YES	YES	FF	Destination
New Mexico	YES	30	YES	YES	FF	Throwback
New York	YES	28	YES	YES	FF	Destination
North Carolina	YES	28	NO[8]	YES	FF	Destination
North Dakota	YES	30	YES	YES	FF	Throwback
Ohio	YES	28	N/A[9]	YES	1971	Destination
Oklahoma	YES	30	NO	YES	1971	Throwback
Oregon	YES[10]	28	NO	NO	N/A	Throwback
Pennsylvania	YES	28	YES	YES	1935	Throwout
Rhode Island	YES	28	NO	YES	FF	Destination
South Carolina	NO	N/A	NO	NO	N/A	Throwback
South Dakota	N/A	N/A	N/A	N/A	N/A	N/A
Tennessee	YES	28	NO	YES	FF	Destination
Texas	N/A	N/A	N/A	N/A	N/A	N/A
Utah	NO	N/A	NO	YES	FF	Destination
Vermont	YES	30	YES	YES	1966	Origin
Virginia	YES	30	NO	YES	1972	Throwback
Washington	N/A	N/A	N/A	N/A	N/A	N/A
West Virginia	YES	30	N/A[11]	YES	FF	N/A[12]
Wisconsin	NO[13]	N/A	NO	YES	1964	Throwback
Wyoming	N/A	N/A	N/A	N/A	N/A	N/A

FOOTNOTES—TABLE IV

[1]California uses the mid-point of the federal asset depreciation range as a guideline but does not allow the entire federal range for depreciation purposes.

[2]Colorado also permits corporations to use a two factor formula, sales and property. For this formula, all sales are attributed to state of destination. Colorado's three factor formula (UDITPA) requires that sales to the U.S. government be attributed to state of origin.

[3]Florida had no corporate income tax ten years ago.

[4]Illinois had no corporate income tax ten years ago.

[5]Kentucky uses federal taxable income "by definition"; i.e., it does not use any particular line of Form 1120, but it does follow federal definitions to arrive at taxable income. Kentucky's form then provides for a reconciliation with the federal return.

[6]Maine had no corporate income tax ten years ago.

[7]Nebraska had no corporate income tax ten years ago.

[8]North Carolina began using federal taxable income in determining the income base effective January 1, 1967.

[9]Ohio had no corporate income tax ten years ago.

[10]Oregon uses federal taxable income in determining the income base, not by statute, but by administrative practice.

[11]West Virginia had no corporate income tax ten years ago.

[12]West Virginia's formula has no sales factor.

[13]Wisconsin only uses federal taxable income in determining the Wisconsin taxable income of domestic insurance companies, real estate investment trusts, and regulated investment companies.

16(A). Does your state (ever) allow credit against use tax liability on (purchases) other than vehicles for sales tax due and paid in other states, with respect to the same purchase transaction and the same property?

YES: 42 NO: 4 N/A: 5

16(C). Did it do so 10 years ago?

YES: 32 NO: 11 N/A: 8

17. Does your state recognize and comply with the Uniform Sales and Use Tax Jurisdictional Standard of the Multistate Tax Commission?

YES: 23 NO: 23 N/A: 5

18. Does your state accept the Uniform Sales and Use Tax Exemption Certificate sponsored by the Multistate Tax Commission?
YES: 35 NO: 12 N/A: 4

19. Does your state furnish information (to other states) regarding out-of-state purchasers claiming exemption (from sales tax in those states)?
YES: 28 NO: 18 N/A: 5

TABLE V

State	16A	16C	17	18	19
Alabama	YES	YES	NO	YES	NO
Alaska	N/A	N/A	N/A	YES[1]	N/A
Arizona	YES	YES	YES	YES	NO
Arkansas	YES	YES	YES	YES	YES
California	NO	NO[2]	NO	NO[3]	YES[4]
Colorado	YES	YES	YES	YES	YES
Connecticut	YES	YES	NO	YES	YES
Delaware	N/A	N/A	N/A	N/A	N/A
District of Columbia	YES	YES	NO	YES	NO
Florida	YES	YES	NO	YES	NO
Georgia	YES	YES	NO	NO	NO
Hawaii	NO	YES	NO	YES	NO
Idaho	YES	NO	YES	YES	YES
Illinois	YES	YES	YES	YES	YES
Indiana	YES	YES	YES	YES	YES
Iowa	YES	YES	YES	YES	YES
Kansas	YES	YES	YES	YES	YES
Kentucky	YES	YES	YES	YES	YES
Louisiana	YES	YES	YES	YES	YES
Maine	YES	YES	YES	YES	YES
Maryland	YES	YES	YES	YES	YES
Massachusetts	YES	YES	YES	YES	YES
Michigan	YES	YES	YES	YES	YES
Minnesota	YES	N/A	YES	YES	YES
Mississippi	YES	YES	YES	YES	YES

TABLE V—Continued

State	16A	16C	17	18	19
Missouri	YES	YES	YES	YES	YES
Montana	N/A	N/A	N/A	N/A	N/A
Nebraska	YES	N/A	YES	YES	NO
Nevada	YES[6]	NO[6]	YES	YES	NO
New Hampshire	N/A	N/A	N/A	N/A	N/A
New Jersey	YES	YES	NO	NO	NO
New Mexico	NO	NO	YES[7]	NO	NO
New York	YES	YES	NO	NO	NO
North Carolina	YES	YES	NO	NO	NO
North Dakota	YES	YES	YES	YES	YES
Ohio	NO	N/A	NO	NO	NO
Oklahoma	YES	YES	NO	YES	NO
Oregon	N/A	N/A	N/A	N/A	N/A
Pennsylvania	YES	YES	NO	YES	YES
Rhode Island	YES	YES	NO	YES	YES
South Carolina	NO	NO	NO	YES	YES
South Dakota	YES	NO	YES	YES	YES
Tennessee	YES	YES	YES	YES	YES
Texas	YES	YES	YES	YES	YES
Utah	YES	NO[8]	YES	YES	YES
Vermont	YES	YES	NO	YES	YES
Virginia	YES	YES	NO	YES	YES[10]
Washington	YES	NO[9]	YES	YES	YES
West Virginia	NO	NO	NO	NO	YES
Wisconsin	YES	YES	NO	YES	NO
Wyoming	YES	YES	YES	YES	NO

FOOTNOTES—TABLE V

[1]Alaska accepts the Uniform Exemption Certificate for Gross Receipts Tax Purposes. Alaska does not impose a sales or use tax at the state level.

[2]California did not allow credit against use tax liability prior to July 1, 1967 for purchases other than passenger vehicles.

[3]California has made certain modifications to the certificate, and if adopted would accept the modified certificate.

[4]California furnishes information only with the Governor's authorization. At present, such authorization exists for several states.

[5]Minnesota did not enact its sales tax until 1967.

[6]Nevada allows credit against use tax liability only on purchases made in full voting member states of the Multistate Tax Commission, on all tangible personal property. Nevada enacted the Multistate Tax Compact in 1967.

[7]New Mexico taxpayers are required to use special New Mexico certificates.

[8]Utah enacted its credit against use tax liability provision in 1967.

[9]Washington had no credit against use tax liability prior to enacting the Multistate Tax Compact in 1967.

[10]Washington has no procedure for automatically furnishing information regarding out-of-state purchasers claiming exemption. Vendors are not required to file reports identifying purchasers, thus, information is not readily available and could only be developed through audit.

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FOR ARGUMENT

No. 76-635

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES STEEL CORPORATION, *et al.*
ON BEHALF OF THEMSELVES AND ALL PERSONS
SIMILARLY SITUATED, *Appellants,*
v.
MULTISTATE TAX COMMISSION, *et al., Appellees.*

On Appeal from the United States District Court for the Southern District of New York

---

REPLY BRIEF FOR APPELLANTS

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---

REPLY BRIEF FOR APPELLANTS

I

THE PRACTICE OF CONGRESS AND THE STATES

The appellees ignore the clearly established practice of Congress in reviewing and approving interstate compacts, as documented in Supplement A and Supplement B to appellants' main brief (pp. 53-120). Instead, they continue to rest their case on the dicta of Mr. Justice Field in *Virginia* v. *Tennessee,* 148 U.S.

503 (1893), where the facts raised a much narrower issue than is involved here. That case involved a one-time, one-place boundary agreement which, as Justice Field said, did not increase "the political power or influence of the states affected." 148 U.S. at 520.[1] The appellees also cite other relatively narrow cases which rely on *Virginia* v. *Tennessee*.

The appellees now contend that "advisory" or "cooperative" agreements (Br. 36) should be added to those which do not require the consent of Congress. On this basis, they argue that the Multistate Tax Compact is valid though Congress has never given its approval. This argument is made even though Congress has considered and approved many such compacts, and has been particularly thorough in examining the operations and potential impact of such compacts, often requiring annual reports, consent to amendments or addition of new members, federal participation, and limited duration unless further consent is obtained.[2]

[1] Even interstate boundary disputes may involve strong national interests. A well-known example is the "Toledo War," arising out of the location of the Ohio-Michigan boundary. See Arthur M. Schlesinger, "Basis of the Ohio-Michigan Boundary Dispute," in the Ohio-Michigan Boundary—Final Report of the Ohio Cooperative Topographic Survey (1916), vol. 1, pp. 59-115; Carl Wittke, "The Ohio-Michigan Boundary Dispute Re-Examined," Ohio State Archeological and Historical Quarterly, October, 1936. This dispute was settled through congressional action. Ohio received the Toledo area, and Michigan was given much of its northern peninsula in recompense.

[2] Appellees offer no comment on the approximately 150 compacts reviewed and approved by Congress, nor do they refer to the many safeguards Congress has employed in approving ongoing, multistate agreements like the Compact now before the Court. Appellees refer only to the hearings before Congress on the Southern Regional Education Compact. (Br. 33.) The lack of consent given this Compact is readily explainable. The Compact was seen as a device to avoid impending school integration in the South. When civil rights leaders informed the Senate that its consent would be an affirmation of this device, and would affect civil rights litigation pending in federal courts in Texas, Oklahoma, South Carolina, and Louisiana, Justice Field's remarks were used as a means of avoiding such affirmation. (The House had already reviewed and consented to the Compact, pursuant to Article I, Section 10.) When a state court later held that the Compact could not be used to avoid integration, *McCready* v. *Byrd*, 195 Md. 131, 73 A.2d 8 (1950), *cert. denied*, 340 U.S. 827 (1950), interest in the Compact waned, and it was never brought back to Congress. *See* Barton, Interstate Compacts in the Political Process (1967) 129-34; Sugg & Jones, The Southern Regional Education Board: Ten Years of Regional Cooperation on Higher Education (1960); Thursby, Interstate Cooperation: A Study of the Interstate Compact (1953) 113-23, 129-34.

The argument is also made in the face of several unsuccessful attempts to obtain congressional approval for the Multistate Tax Compact, and despite the fact that all of the member states belong to "advisory" or "cooperative" compacts for which congressional review and consent has been sought and obtained.

The position of the appellees leaves little scope for Article I, Section 10, despite the fact that the well-established practice of Congress, and of all the participating states, shows that it is understood to have wide effect. As their explanation of the scope of Article I, Section 10, appellees refer (Br. 36) to—

> the distinction between cooperative agreements, such as the Compact in question, which do not require congressional consent, and conflict-resolving agreements which might require consent . . . .

They offer (Br. 35) as an example of a conflict-resolving agreement a "typical border dispute." Yet this is just the reverse of *Virginia* v. *Tennessee* and the congressional practice with respect to compacts. Under appellees' arguments, boundary and other dispositive,

"conflict-resolving" agreements would require consent, despite the result in *Virginia* v. *Tennessee* and despite appellees' reliance on that result in arguing for the exemption of the Multistate Tax Compact; while "advisory" or "cooperative" compacts, which have been consistently reviewed by Congress and which have never been upheld by this Court in the absence of congressional consent, would be exempted from the consent requirement.

II

THE COMPACT HAS SUBSTANCE AND IMPACT

The appellees also seek to create the impression that the Compact and Multistate Tax Commission are without effect, and almost nonexistent as separate entities. The Compact is compared to uniform legislation (Br. 17, 44, 45), and the observation is made that such legislation need not be approved by Congress. Of course, uniform legislation does not require seven states to join before it is effective, as did the Compact, nor need a state "withdraw" from uniform legislation. Moreover, the member states of the Compact knew they were joining an interstate compact. The enabling legislation in most states specifically provides that the Compact is *adopted and entered into* with all other member states.

Wyoming, for example, authorized its Governor to negotiate and enter into the Compact on behalf of the state, adopting the language and practice common to treaties. Washington also employed treaty language, "entering into," "approving," and "ratifying" the Compact. Colorado placed the Compact in a separate article, far from its revenue laws, entitled "Interstate

Compacts and Agreements." This article is part of the title codifying the structure of Colorado's government, and lists the other compacts to which Colorado belongs, including other "cooperative" or "advisory" compacts which have received the consent of Congress. Michigan also placed the Compact in a chapter entitled "Interstate Activities," which compiles the other compacts in which Michigan is a member.[3]

Thus, it is hardly appropriate at this late date to argue that the Compact does not exist—that it has no substance or impact. It is, both in form and effect, a substantial agreement among the states, coming well within the words and substance of Article I, Section 10. It was called a compact by its draftsmen; it is called a compact today and throughout the appellees' brief; it is intended to be a compact; it was brought before Congress seeking approval as a compact; and it is acting as a compact.

The appellees also urge the Court to ignore or minimize the operations and existence of the Multistate Tax Commission. (Br. 6, 11, 13, 15, 43, 57, 77, 78.) The Commission is compared to a voluntary organization like the American Bar Association ("ABA"). (Br. 10, 60, 61.) As this Court knows, however, voluntary organizations like the ABA may not compel citizens to comply with their commands regarding the production of records, documents, and personnel in order to formulate "advice," as the Commission may do pursuant to the subpoena powers granted it by its members.[4] The

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[3] The state code citations appear in appellants' brief 4. The correct citation for Colorado is Colo. Rev. Stat. 1973, Art. 24-60-1301.

[4] The appellees claim repeatedly that the Commission is without

ABA, for example, has never forced citizens to produce all worldwide financial records so that it could issue a "recommendation."

The simple fact is that the Commission is different from organizations like the ABA. It is the official body of a multistate compact, formed by and adopted into the laws of nineteen states, and cloaked with government authority, though with minimal governmental responsibility. It develops tax regulations and conducts multistate and multinational tax audits that are an integral part of the governmental function of taxation. It is empowered to issue its own subpoenas and utilize the full authority of the state courts throughout the region united by the Compact, and it has in fact issued subpoenas and sued in its own name to compel the production of private records.

Appellees also argue that because the member states of the Compact can adopt tax regulations and conduct audits on an individual basis, they must be allowed to pursue such activity on a concerted basis. (Br. 15, 42, 43, 44.) However, the law has always recognized that concerted activity may present dangers that individual

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power. (Br. 6, 11, 13, 15, 43, 57, 77, 78.) However, Article VIII of the Compact states, in part:

> "3. The Commission may require the attendance of any person within the State where it is conducting an audit or part thereof at a time and place fixed by it within such State for the purpose of giving testimony with respect to any account, book, paper, document, other record, property or stock of merchandise being examined in connection with the audit. If the person is not within the jurisdiction, he may be required to attend for such purpose at any time and place fixed by the Commission within the State of which he is a resident; provided that such State has adopted this Article." (Jur. St. App. E, pp. 54a, 72a-73a.)

action would not.[5] Moreover, requiring groups of states to obtain the consent of Congress for activities that arguably could be undertaken individually does not represent a sudden or unwarranted shift of power to the Federal Government. As noted above, the consent of Congress has been sought and obtained for almost every compact formed since the founding of the Nation, and thus a decision requiring the Multistate Tax Compact similarly to seek such consent does not constitute a shift in power or policy. All of the states appearing as *amici curiae*, and all of the states of the Compact, have sought and obtained the consent of Congress as members of interstate compacts without experiencing a sudden loss of power and without destroying their ability to cooperate with each other. It should also be noted that, regardless of the decision in this case, the states appearing as *amici curiae* can continue to enact uniform legislation without approaching Congress, and their state officials can continue to join the ABA.

Finally, the appellees again argue that the Compact does not require congressional consent because it is cast in an "advisory" and "voluntary" form. (Br. 6, 15, 17, 36, 43, 44, 58.) To support this argument, the appellees would limit the consideration of this Court to the words of the Compact "on its face," in an attempt to prevent this Court from considering the potential effects presented—and already realized—under

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[5] *See* Hawkins, Pleas of the Crown, 6 ed., bk. 1, ch. 72, sec. 2. *See also Rex* v. *Starling*, 1 Sid. 174 (1665); *Rex* v. *Delaval*, 3 Burr. 1434 (1763). For U.S. cases, *see, e.g., Grenada Lumber Co.* v. *Mississippi*, 217 U.S. 433, 440 (1910); *Eastern States Lumber Ass'n* v. *United States*, 234 U.S. 600, 614 (1914); *FTC* v. *Raymond Bros.-Clark Co.*, 263 U.S. 565, 574 (1924).

the Compact.[6] Thus, appellees would note only that the multistate audit article of the Compact is "voluntary," and would ignore the fact that all member states have adopted the audit article and that numerous audits have been conducted by the Commission. Similarly, the appellees emphasize that the Commission's regulations are "advisory," and neglect to mention that at least eleven members have adopted the regulations, and that such regulations have been employed in numerous multistate audits. The appellees also ignore the many abuses that have occurred under the Compact,[7]

[6] Throughout their brief, appellees claim that appellants' action is based on the Compact "on its face." (Appellees' Br. 2, 17, 55, 57, 70, 76, 80.) However, appellants' complaint stated:

"Statement of Claim

19. The Multistate Tax Compact, in enactment *and in operation*, is in violation of the Constitution of the United States, the constitution of numerous states, and of controlling state law on numerous grounds, including . . ." (App. 7; emphasis supplied).

The section of the complaint which appellees cite (Br. 2) as confining this Court to the face of the Compact asked the court below to:

"Enter preliminary and permanent injunctions enjoining the Multistate Tax Commission and the individual defendants, their successors, agents and employees, and all other persons in active concert and participation with them from implementing and enforcing the provisions of said Multistate Tax Compact, whether through the office of the member states or otherwise, enjoining such Commission from taking any further actions whatsoever, and requiring such Commission to be disbanded." (App. 9-10.)

[7] The claim of irrelevancy is apparently appellees' only reply to the arbitrary tax assessments and arbitrary subpoena campaign conducted by the Commission to force appellants and other taxpayers to "capitulate" to the Commission. *See* appellants' Br. 48-51. Also, contrary to appellees' charge, appellants have cited cases (appellants' Br. 50) ordering the practices of the Commission stopped, although most cases concerning the Compact have been stayed pending decision in this case. Finally, it is not inconsistent,

apparently failing to realize that the potential impact of a law is established by its practical administration. The appellees go so far as to disassociate the Commission from its own official publications and the actions of its Executive Director, General Counsel, and Audit Coordinator. (Br. 78.)

Thus, in effect, the appellees wish this Court to judge the Compact in a vacuum: When appellants discuss the far-reaching potential of a compact intended to transform interstate and international taxation, appellees dismiss these efforts as speculation. When appellants establish that the potential impact of the Compact has been realized, by showing that regulations have been issued, multistate audits conducted, non-business income apportioned, unitary business/combined reporting practices employed, arbitrary assessments recommended, United States treaty partners angered, and abusive subpoenas issued, appellees reply that such "administration" is irrelevant. (Br. 19, 56, 71.) In essence, this Court is asked to ignore what has happened and what may happen under the Compact. Appellants believe, however, that the actual and potential effects of the Compact demonstrate that the Compact's impact should be evaluated by Congress, and that the consent of Congress should be obtained before the Compact is considered valid.[8]

as appellees claim (Br. 75), for appellants to note both that the Compact is a powerful force affecting interstate taxation and that the Compact has produced abusive, inefficient, and confusing practices.

[8] Even if the Court confines itself solely to the terms of the Compact, it will see that the Compact creates a multistate administrative body intended to operate on an ongoing basis; that multistate and multinational audits are authorized; that regulations may be issued and tax assessments recommended; that subpoena powers

III

THE APPELLANTS' ARGUMENTS ARE NOT "IRRELEVANT" OR "ERRONEOUS"

Appellees repeatedly accuse appellants of making "irrelevant," "immaterial," "unsupported," "erroneous," "conjectural," "defective," and "misleading" arguments. (Br. 2, 6, 19, 22, 55, 56, 57, 61, 63, 65, 69, 72, 74, 76, 79, 80.) Although this litany appears so frequently that appellants cannot address each repetition, consideration of several of appellees' charges should establish that appellants have not misled this Court.

1. Appellees assert several times that appellants have made no reference to the provisions of the Compact. (Br. 6, 18, 19.) These assertions are unwarranted, since appellants' entire argument is based on the stated purpose of the Compact (Article I), the creation of

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are granted; and that rules and practices could be expected to develop under all these powers, and pursuant to the Compact's "necessary and proper" clause. (Art. VI, 3 of the Compact; Jur. St. App. E, p. 69a.) More important, it would observe that the Compact is designed to transform multistate taxation. When the power contained in these terms is compared to the consistent practice of Congress with respect to compacts, it is clear that the Compact is an agreement among the states requiring congressional consent under Article I, Section 10.

Thus, for example, although the Interstate Compact to Conserve Oil and Gas is completely "voluntary" and "advisory," Congress has periodically reviewed its operations because, as one commentator observed, "Legally, it has no power; actually, it is the most powerful and respected agency in the oil and gas industry." Leach, *The Interstate Oil Compact: A Study of Success*, 10 Oklahoma Law Rev. 274, 287-8 (1957). Similarly, although the Great Lakes Basin Compact is also "advisory," the Attorney General advised Congress that its consent was needed, because the formulation of recommendations is an important function which may significantly influence events. (Appellants' Br. 23.)

the Multistate Tax Commission by the Compact (Article VI), the regulations authorized by the Compact (Article VII), the multistate audits undertaken pursuant to the Compact (Article VIII), the subpoena powers granted the Commission by the Compact (Article VIII), and the rules, practices, and abuses which have developed and occurred under Compact Articles I, VI, VII, and VIII, as well as pursuant to the Compact's "necessary and proper" clause (Article VI, 3).

2. Appellees also charge that appellants' statement that the Commission's regulations are inconsistent with UDITPA is a misrepresentation. (Br. 79.) Among the citations supporting appellants' statement was an article by the General Counsel of the Commission. Appellees, however, claim that this article did not discuss the validity of the Commission's regulations. Yet the article stated that the Commission has developed regulations, and that industry groups believe "the regulations promulgated by the Multistate Tax Commission in implementing UDITPA do not conform to its provisions dealing with the treatment of dividend income." It then continued:

> "This marked difference between the attribution rules concerning 'business income' and those concerning 'nonbusiness income' lies at the heart of the controversy over the Multistate Tax Commission regulations between COST [an industry group] and the states. The UDITPA distinction between 'business' and 'nonbusiness' corporate income appears to lack any rational basis and has created confusion for taxpayers and tax administrators alike. The Multistate Tax Commission has, therefore, concluded that the distinction should be eliminated by treating all corporate income as apportionable business income. . . . Since UDITPA,

an integral part of the Compact, specifically contemplates the designation of at least some income as nonbusiness income, and since the Multistate Tax Commission is reluctant to recommend amendments to the Compact that would be necessary to implement the 'full apportionment' concept under UDITPA, the Commission has chosen to rely for the present upon its regulations to clear up as much of the confusion as possible." (Footnote omitted.)[9]

3. Appellees state that appellants "take staff statements out of context and cite them in support of statements in the Brief which they do not support." (Br. 78.) To substantiate this, appellees refer to an article by the Executive Director of the Commission which appeared in the Seventh Annual Report of the Commission. Appellants cited the article in connection with the Commission's adoption of practices related to unitary business/combined reporting, and full apportionment, rather than allocation, of dividends and other non-business income. Appellees assert that the article "did not discuss the rules or practices of the Commission." (Br. 78.) Contrary to this assertion, however, the article did discuss the Commission, its rules, and its practices. The article stated that a new system of interstate taxation was needed, which:

> "1. Would impose no limitations upon the states insofar as the apportionable tax base is concerned . . . ; 2. Would treat a business in the same way for tax purposes whether that business was conducted through one corporation or through many corporations, i.e. would apply the unitary business/combination concept; 3. Would provide

[9] *See Dexter*, 29 Vand. L. Rev. 401, 404-405, 407 (1976) (cited in appellants' Br. 27, 48).

guidelines on the basis of which to apply the combination concept; and 4. Would provide for the application of the combination concept on a uniform basis among all of the states. . . .

There currently exists in America only one organization which contains the potential to serve in this suggested capacity. That is the Multistate Tax Commission. It is the only entity which exists as a result of legislative fiat from among many states, the number of which is currently twenty-one, through its charter which is known as the Multistate Tax Compact. . . . As a matter of practice, it already participates in some of the tax administration activities of some of its member states. Included among its activities is a pilot joint audit program under which an audit of a corporate business is performed on behalf of several participating states at the same time. While this has drawn the fire of a large segment of the multicorporate business community, that opposition has mostly been generated by disputes concerning matters to which I have already referred; namely, combination, allocation and apportionment, and exemption of dividends."[10]

4. Appellees charge that appellants have "commingled" (Br. 79) concepts and adopted a "simplistic" (Br. 72, n.31) approach in discussing the differences between standard practices in international taxation, as adopted by the United States and all of its treaty partners, and the unitary business/combined reporting approach employed in many Commission audits. The appellees argue that there is no such standard international practice. Moreover, appellees state that the use of unitary business/combined reporting practices

[10] *See* Seventh Annual Report of the Multistate Tax Commission, pp. 49-50.

cannot encroach upon or interfere with the national interest until a law or treaty affirmatively forbidding such practices is passed (Br. 17, 69, 70, 74), ignoring the problems such practices have caused with our treaty partners and the treaty renegotiations such practices have required. Finally, the appellees assert that unitary business/combined reporting practices are valid and workable (Br. 72, 73), while appellants believe that such practices produce procedural burdens and lead to possible multiple taxation.

On July 19, 1977, Assistant Secretary of the Treasury Laurence N. Woodworth testified before the Senate Foreign Relations Committee on the United Kingdom tax treaty, which contains restrictions on the use of unitary business/combined reporting practices in an international context.[11] Dr. Woodworth noted that such practices produced complaints from our treaty partners, violated the spirit of United States tax treaties, varied from internationally-accepted practices, produced potential misallocations of income and possible multiple taxation, resulted in extraterritorial taxation, and created accounting and other procedural burdens.[12]

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[11] The appellees claim (Br. 73, n.33) that appellants' explanation of the treaty is inaccurate. However, appellants' explanation was taken word for word from the United States Department of State and the Ninth Annual Report of the Multistate Tax Commission. (*See* appellants' Br. 38-39.) It will hardly do to say (as appellees do, in discounting appellants' explanation of unitary business/combined reporting practices and the Commission's opposition to the U.S.-U.K. tax treaty, quoted from the Ninth Annual Report of the Commission) that the practices and policy reported in the Annual Reports of the Commission are not the policy or practices of the Commission. (Br. 78.)

[12] In testifying, Dr. Woodworth explained international tax concepts and practices in a manner similar to appellants. Dr. Woodworth discussed the adverse effects of unitary business/combined reporting practices in the international context, using California's practices as an example. The relevant portions of Dr. Woodworth's testimony are included as Appendix A, at pp. 19-22, below. John Lobdell, Chairman of the Multistate Tax Commission, testified in opposition to the U.S.-U.K. treaty restrictions on unitary business/combined reporting practices, after explaining that the Commission had adopted the policies and practices of California. Senate Foreign Relations Committee Hearing, July 19-20, 1977, not yet printed.

5. The appellees deny several times that the Compact is a regional effort (Br. 56, 63, 64), listing several "associate" states that lie east of the Mississippi River. Such associate states, however, are not members of the compact." Indeed, among the states cited as an associate is Alabama, which has agreed to join the Compact if the consent of Congress is obtained, as required by the Constitution. A map of the present membership of the Compact, based on a map taken from the Ninth Annual Report of the Multistate Tax Commission is printed as Appendix B at page 23, below; it shows rather clearly that the Compact is regionally based.

6. The appellees charge (Br. 56) that much of appellants' argument is "intended to discredit the Compact, the Commission and its work in the eyes of this Court." This charge is made in connection with appellants' observation (appellants' Br. 29) that the Commission frequently adopts rules or practices inconsistent with the laws of the member states, an observation made in discussing the change in voting procedures adopted by the Commission without the approval of the legislatures of the member states. Although appel-

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[13] It should also be noted that the states appearing as *amici curiae* have not joined the Compact, despite their expression of support. In fact, two of the states appearing as *amici curiae* are past members that have formally withdrawn from the Compact.

lees characterize this observation as an attempt to discredit the Commission, they omit any discussion of the change in voting rules, which took place exactly as described by appellants. In fact, the State of Indiana has recently withdrawn from the Compact because the change in voting rules adopted by the Commission conflicted with the Indiana Constitution.[14]

CONCLUSION

No characterization of appellants' argument can alter the fact that the Multistate Tax Compact exists as an "Agreement or Compact" formed by nineteen states without the consent of Congress. The Compact intends to transform interstate and international taxation; it creates a multistate administrative body designed to function on a continuous basis; it calls for the adoption of tax regulations; it authorizes multistate and multinational audits; and it provides for enforcement powers. Moreover, all the practices authorized by the Compact have been effectuated, and abuses have occurred. Thus, in accordance with the words used in the Constitution, and pursuant to the long-standing recognition by Congress of its constitutional responsibility under Article I, Section 10, the powers inherent in the Compact—and already realized in fact—should

[14] *See* Indiana P.L. 90 (S.B. 414), effective July 1, 1977.

not be allowed to continue until the Compact has been reviewed by Congress, and the Compact should be declared invalid until the consent of Congress is obtained as required by the Constitution.

The judgment below should be reversed.

Respectfully submitted,

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September, 1977

APPENDIX A

Testimony of Assistant Secretary of the Treasury, Laurence N. Woodworth *

Background of the Treaty Provision

Over the past several years, a number of our treaty partners have raised the question of state application of unitary apportionment systems to multinational corporate groups based in their countries. They have made essentially two points.

First, they note that our income tax treaties clearly provide that one Contracting State may not tax the business profits of an enterprise which is a resident of the other State unless those profits are attributable to a permanent establishment in the first Contracting State. They perceive the California system as taxing profits which are earned outside California and not attributable to a permanent establishment located in California.

Our treaty partners recognize, of course, that this California practice does not violate the business profits provisions of our existing treaties, because existing treaty provisions apply only with respect to the Federal income tax. Nevertheless, they maintain that state unitary apportionment systems, as applied to foreign corporations, do violate the spirit of our agreements.

Secondly, foreign governments have noted the severe administrative burdens which unitary apportionment systems impose on their corporations. A substantial amount of financial and operating data from each affiliate (in effect the data necessary for a full tax return) must be included in the combined report of the group. When members of the group, and particularly the parent corporation, are located

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* Dr. Woodworth's testimony was reprinted in the Daily Tax Report, No. 140, July 20, 1977, p. J-10.

abroad, much of this information is either difficult or impossible for the taxpayer to obtain.

Foreign parent corporations find it extremely burdensome to submit all of their books and records concerning all of their worldwide activities in a form satisfactory to the taxing state. This is especially true when only one of a large number of their affiliates does business in the state and the books and records are kept in different languages, different currencies, and according to different sets of accounting rules.

Reasons for Treaty Provision

There are several reasons, both substantive and administrative, why the Treasury believes that the application of the unitary system should be limited as it applies to foreign corporations.

Those states which employ the unitary system see it as a logical extension of the standard use of the three factor formula. It is also viewed as a means of dealing with efforts by groups of related corporations to manipulate income and expenses to the detriment of the state treasury. This is a legitimate concern of both Federal and state governments.

The treaty, however, deals explicitly with this issue. Paragraph 1 of Article 9 provides for the adjustment of accounts between related persons to reflect the income and expenses which would be recorded if the related persons were dealing at arm's-length.

And Paragraph 4 of Article 9 is very clear that it does not prevent Federal or state governments from making the arm's length adjustments provided for in Paragraph 1.

In this connection I would note that the arm's-length standard is the internationally-accepted norm for apportioning income between related taxpayers. It is confusing to other countries and disconcerting to international relations when our states use a different standard.

Furthermore, the use of a different method by one jurisdiction will often lead to double taxation. We recognize that the purpose of the unitary system is not to tax the income of the foreign corporation included in the group, but the effect, nevertheless, is often extraterritorial taxation.

Though the administrative resources available to state governments may not permit them to make the same kind of intensive transfer price investigations that the Federal tax authorities are able to make, individual states have access to materials developed by the Internal Revenue Service in its investigations of cases where related companies may not be pricing according to an arm's-length standard.

Moreover, the unitary apportionment system as a means for determining the state taxation base of a multinational corporation is highly imperfect and a poor substitute for the arm's-length standard. Implicit in the unitary system is the assumption that profit rates in different units of a corporate family, engaged in different activities and in different locations, are always the same. This is clearly not the case.

And when it is not the case, the unitary system will misallocate income. Whenever profit rates are higher in foreign affiliates than in domestic activities, the unitary system allocates too much income to the domestic member or members of the group. The result is tantamount to taxation by a state government of the foreign income of a foreign corporation.

The misallocation of the tax base under the application of unitary apportionment to foreign corporations can occur for several reasons. For example, labor costs vary substantially among countries—very much more so than among regions in the U.S. If two affiliates, one in California and one in, say, Hong Kong, are engaged in essentially the same activities, the Hong Kong labor cost element in the formula will probably be lower than the California labor cost. A disproportionate amount of income will be appor-

tioned to California. Changes in exchange rates can have a similar effect.

Some state governments have suggested that the treaty provision will result in a large revenue cost to unitary taxation states. If, in fact, there is a substantial revenue loss when an arm's-length pricing standard replaces unitary, this may be an indication that unitary apportionment does, in fact, result in unjustifiable extraterritorial taxation.

We also perceive a major problem in the extensive information required by the tax authorities applying unitary apportionment systems. If the necessary information is not provided by the taxpayer, the state authorities reconstruct accounts on the basis of whatever information they can obtain from public sources, such as reports to shareholders. Tax liability calculated on the basis of such reconstructed accounts is, at best, arbitrary, and may very well be unfair.

If the parent corporation operates in the taxing state, it is of course possible for the taxpayer to provide accurate information and avoid an arbitrary result. But if the taxpayer is a subsidiary of a foreign parent corporation, or stands in a brother-sister relationship to a foreign affiliate, the submission of accurate data may not be within the taxpayer's power.

The Administration is not alone in considering the issues raised by the unitary system. Legislation, known as the Jones Amendment, was proposed in the House during this past congress, and would exclude all foreign corporations from states' unitary tax bases. The Jones Amendment was referred to a special task force of the Ways and Means Committee on foreign source income. The task force, chaired by Congressman Rostenkowski of Illinois, has recommended that "States be precluded from taking into account, under the unitary method or under any other method, the income of foreign affiliates of corporations doing business within the States until such time as that income is subject to Federal income tax."

APPENDIX B

CURRENT MEMBERSHIP OF THE MULTISTATE TAX COMMISSION

This map is based on a map printed in the Ninth Annual Report of the Multistate Tax Commission, p. xviii. Wyoming and Indiana have withdrawn since this Report was published, and they have been deleted as members on the map as reproduced here. "Associate" states also are not shown here.

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No. 76-635

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October Term, 1977

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Appellants,

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AMICUS CURIAE FOR THE COUNTY OF LOS ANGELES RE: CONGRESSIONAL AUTHORITY TO PROHIBIT STATE AND LOCAL TAXES AND THE APPORTIONING OF TAXES

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with an argument to the effect that the state action there was a regulation and that the import-export clause (Art. I, §10, cl. 2) prohibited one specie of state regulation thus positively affirming the uncontrollable right to impose others. Justice Marshall accepted this argument, but stated that the state action was not regulation but taxation. He said,

> "Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defense and general welfare of the United States. This does not interfere with the power of the states to tax for the support of their own governments; nor is the exercise of that power by the states an exercise of any portion of the power that is granted to the United States." (22 U.S. (9 Wheat.) 1, at p. 199, 6 L.Ed. 23 at p. 71)(emphasis added).

The Court goes on,

> "Congress is not empowered to tax for those those purposes which are within the exclusive province of the states. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to Congress, and in doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce. . . .

> "The sole question is, can a state regulate commerce with foreign nations and among the states, while Congress is regulating it?
>
> "The counsel for respondent answer . . . that limitations of a power furnish a strong argument in favor of the existence of that power, and that the section which prohibits the states from laying duties on imports or exports proves that this power might have been exercised, had it not been expressly forbidden; and, consequently, that any other commercial regulation not expressly fobidden, to which the original power of the state is competent, may still be made. That this restruction shows the opinion of the convention, that a state might impose duties on exports and imports, if not expressly forbidden, will be conceded; but that it follows as a consequence from this concession, that a state may regulate commerce, with foreign nations and among the states, cannot be admitted . . . [because] [w]e think it very clear that [the import-export clause] . . . is considered as a branch of the taxing power. . . .
>
> "This prohibition, then, is an exception from the acknowledged power of the states to levy taxes. . . ."
> (22 U.S. (9 Wheat.) 1, at pp. 199-202, 6 L.Ed. 23 at p. 71.)

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INTEREST OF THIS AMICUS CURIAE

The Amicus Curiae collects some $3 billion in property taxes which provide for the local services provided to business and personal property, including intrastate, interstate, and

foreign businesses.

The assumptions made and positions taken by the appellants will eventually lead to the possible cancellation of ANY or ALL of this revenue.

SUMMARY OF ARGUMENT

State taxation has always "burdened" interstate and foreign commerce. But it does not always regulate commerce. The framework for this case is the interpretation of Congress' power under the commerce clause. That clause has been misunderstood in that regard since 1940.

It is time to review what our founding fathers actually had in mind when conferring the regulation of commerce on Congress and the power to tax on both federal and state governments.

THE COMMERCE CLAUSE DOES NOT CONFER ON CONGRESS THE POWER TO PROHIBIT OR REGULATE STATE TAXES AS LONG AS THOSE TAXES ARE NON-REGULATORY.

The appropriate test, then, for determining the commerce clause issues in this case is whether some procedural aspect of the states' action is regulatory. If, and only if, that action is regulatory, then the usual analysis of the effect of Congressional pre-emption of the field and the necessity for uniform regulations can be applied. But Congress cannot pre-empt non-regulatory state taxation.

The foundation for these views is the historical analysis of the commerce clause and other provisions detailed in Clark, Property Taxation of Foreign Goods and Enterprise -- A Study in Inconsistency, 4 Pepperdine Law Review 39 (1976).

The appellants' argument concerning the apportioning of taxes in accordance with the business activities of the taxpayer in the taxing jurisdiction do not reflect on the commission itself, but call into question the whole federal-state relationship. It is clear that apportionment of taxes is not a new concept. It is also apparent that the appellants' arguments to the effect that states must never have any effect on international affairs is contrary to the states' very existence.

The states can maintain both logically and under the constitution, a state tax system which will gather revenue without regulating interstate or foreign commerce.

I
INTRODUCTION

The appellant has suggested that by the act of taxing, the states have regulated commerce. It is important to understand, however, that regulation and taxation are not the same thing. As Chief Justice Marshall said in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824),

> "But when a state proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce."

Somehow during the last 150 years courts began to view taxation in the same way as regulation, and at one time it was in vogue to test the propriety of state taxes under the commerce clause on the basis of whether they "substantially burdened" interstate commerce.

Of course, whether a substantial burden was imposed or an insubstantial one, depended in large part on the "gut reaction" of the justice reviewing the tax. Such tests do no good for either the taxing authority or the taxpayer.

Perhaps the most detailed set of criteria supplied by the Court under the commerce clause was set forth in its recent opinion in Complete Auto Transit v. Brady, ___ U.S. ___, 51 L.Ed. 2d 326, 97 S.Ct. 1076 (1977).

This same criteria is appropriate to determine when a tax becomes regulatory.

Thus, the appellants' reliance on the Commerce Clause is misplaced in that Congress does not have the authority the appellants contend the Commission is taking.

II
CONGRESS DOES NOT HAVE THE AUTHORITY TO PROHIBIT OR REGULATE STATE NON-REGULATORY TAXATION

"I am willing here to allow, in its full extent, the justness of the reasoning, which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession, I affirm that (with the sole exception of duties on imports and exports), they would, under the plan of the Convention [i.e., the Constitution], retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the National Government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its Constitution."

This Amicus Curiae is of the opinion that this statement from the Federalist Papers (#32 by Alexander Hamilton) is as true today as it was in 1789. It has been falsely assumed that the power of Congress to prohibit state taxes exists. But when one closely researches the cases relied upon for this assumption, it can be seen that they all deal with Congressional power to prohibit state regulation of commerce.

The two powers are distinct, although it is clear that taxation may become regulatory.

The dicta of late nineteenth century cases and its effect on the thinking of the courts is detailed in Clark, supra, 4 Pepperdine Law Review 39.

It should be emphasized that when taxes become regulatory, discriminating for or against interstate or foreign commerce, they are then regulatable by Congress (and, indeed possibly outright void as either encroaching on an area already pre-empted by Congress or on an area where national uniformity is required, i.e., in dealing with foreign enterprises). But as this court said,

> "It is obvious that such nondiscriminatory property taxation can have no impact whatsoever on the Federal Government's exclusive regulation of foreign commerce, probably the most important purpose of the [import-export] clause's prohibition." (Michelin Tire Corp. v. Wages, 423 U.S. 276 at p. 286.)

The statement also applies to all forms of state taxation which do not regulate commerce.

A reading of the Federalist Papers (especially nos. 32 and 33) should be enough to convince one that the Congressional authority to prohibit these "neutral" taxes simply does not exist. Justice Marshall explicitly recognized the lack of power in Gibbons v. Ogden, supra. He was confronted

So Justice Marshall fully confirms the absolute right in the states to impose taxes, which Alexander Hamilton had previously described.

Justice Taney rendered the same opinion of the states' ability to tax without control by Congress.

> "Upon examining the [Gibbons v. Ogden] opinion, it will be seen that the Court, when it uses the expressions which are supposed to coutenance the doctrine of the exclusive power in Congress, is commenting upon the argument of counsel in favor of equal power on the subject in the states and the general government, where neither party is bound to yield to the other; and is drawing the distinction between cases of concurrent powers and those in which the supreme or paramount power was granted to Congress. It therefore very justly speaks of the States as exercising their own powers in laying taxes for state purpose although the same thing is taxed by Congress; and as exercising the powers granted to Congress when they make regulations of commerce. In the first case, the state power is concurrrent with that of the general government -- is equal to it, and is not bound to yield." (The License Cases, 46 U.S. (5 How.) 504 at pp. 581-582, 12 L. Ed. 256 at p. 291.)

In M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 (1819), the tax was not struck down because it was prohibited by Congress, but

because it was regulatory. In Brown v. Maryland, supra (as this court noted in Michelin Tire Co. v. Wages, 423 U.S. 276 (1976)), the Court did not invalidate the discriminatory tax because it was prohibited by Congress, but because it was laid upon imports because of their foreign origin and was therefore regulatory. Chief Justice Marshall makes several attempts to explain that when such a tax would fall upon all property uniformly, it would be appropriate, but,

> "Any penalty inflicted upon the importer for selling the article in his character of importer, must be in opposition to the act of Congress which authorizes importation." (25 U.S. (12 Wheat.) 419, at p. 448, 6 L. Ed. 678 at p. 688)(emphasis added).

So Gibbons v. Ogden, supra, and all of the other cases cited for the proposition that Congress' authority to prohibit state taxation is complete, simply do not support the theory.

III
LATE NINETEENTH CENTURY CASES DO NOT SUPPORT THE THEORY OF CONGRESSIONAL CONTROL OF STATE TAXATION

The difference between regulation and taxation was once understood (and has been again brought to light in Michelin Tire Corp. v. Wages, supra). But toward the middle of the nineteenth century the distinction between the two became

clouded. Again, this process is developed in Clark, supra.

It may be that part of the confusion in the late 19th century stems from the fact that Cooley v. Board of Port Wardens, 53 U.S. (12 How.) 299, 13 L.Ed. 996 (1851) tacitly lumps state powers which are vested in Congress by the constitution and able to be performed by the states only until exercised by Congress, with taxing power. (See 53 U.S. (12 How.) 299, at pp. 318-319, 13 L.Ed. 996 at pp. 1004-1005). But a close reading of the language there does not support the conclusion that the Cooley court felt that the two should be subject to the same Congressional controls. In fact, by referring to the very Federalist Papers which maintain the absolute authority in the states, Cooley, implies the contrary. (The cases cited at 53 U.S. 319, 13 L.Ed. 1005 deal with powers presently called "concurrent," i.e., those given to Congress, but exercisable by the states until Congress acts, e.g., to regulate commerce [Wilson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 7 L.Ed. 412 (1829)], to court martial militiamen called to national duty [Moore v. Houston, 18 U.S. (5 Wheat.) 1, 5 L.Ed. 19 (1820)], and to create bankruptcy laws [Sturges v. Crownshield, 17 U.S. (4 Wheat.) 122, 7 L.Ed. 412]).

The nature of the power of taxation is different in that,

> "The power of taxation . . . is capable of residing in, and being exercised by, different authorities at the same time." (Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 at p. 197, 6 L.Ed. 23 at p. 71.)

And,

> "[neither] is bound to yield." (The License Cases, 46 U.S. (5 How.) 504 at p. 582, 12 L.Ed. 256 at p. 291.)

The power of taxation, then, is both a dual power and totally separate from the power to regulate commerce.

> "There is no analogy, then, between the power of taxation and the power of regulating commerce." (Gibbon v. Ogden, 22 U.S. (9 Wheat.) 1 at p. 199, 6 L.Ed. 23 at p. 71.)

So, the power of Congress, now assumed to stop all state action in the area of taxation was never recognized during the period at which the Constitution was ratified and being first interpreted, and there is abundant authority for the proposition that the states' right to tax is "sacred" (Brown v. Maryland, supra, 25 U.S. (12 Wheat.) 419 at p. 448, 6 L.Ed. 678 at p. 689). Professor Crosskey in his book Politics and the Constitution in the History of the United States (Univ. of Chicago Press (1953)) sets forth one possible reason why this confusion took place. It was in the interests of the southern states to protect themselves from the totality of federal regulation which Professor Crosskey theorizes. The justices on the Supreme Court from the South were interested in that protection and developed the "territorial view" that regulation by Congress was appropriate outside the states' borders.

The theory that Congress and the states exercised "concurrent" powers to regulate interstate commerce grew when the theory was to the advantage of the states. But Justice Taney called the taxation power "equal" (The License Cases, supra, 46 U.S. (5 How.) at p. 582, 12 L.Ed. 256 at p. 291) meaning capable of being exercised at the same time.

The Cooley court, as previously pointed out, put that power in the same paragraph as powers capable of being exercised part by one party and part by another, but not the same part by the same party (i.e., incapable of being exercised by two parties at the same time).

The dicta later on toward the turn of the century was stronger yet, and the stage was set for the collapse of the territorial view as Congress asserted its authority in interstate commerce regulation. That collapse would cause the view that Congress could prohibit state taxation (see also, Clark, supra).

IV
THE TWENTIETH CENTURY -- "CENTRALIZATION"

The view that Congress' authority to regulate interstate and foreign commerce was plenary and complete, grew to mean that Congress had the authority to regulate any state or local action in any way affecting the commerce. One recent statement of this misconception was made in Board of Trustees v. United States, 289 U.S. 48 (1933). There, the Court dealt with a state university's contention that its property, imported from abroad, should not be subject to customs duties because the university was a part of the state. Of course, the simple answer to the university's contention is that the federal regulations cannot, and should not, be ignored simply because it affects property belonging to a state (see New York v. United States, 326 U.S. 572, 90 L.Ed. 326. 66 S. Ct. 310 (1946)). But the Court went further, assuming

that because revenue was derived from the tariffs, they were a tax as well as a regulation. But even following this assumption appropriately leads to the validity of the federal levy because ". . . neither is bound to yield." (The Licenses Cases, supra, 46 U.S. (5 How.) 504 at p. 582, 12 L.Ed. 256 at p. 291.) But the Court said in speaking of the commerce clause,

> "It is an essential attribute of the power that it is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified, or impeded to any extent by state action." (289 U.S. 48 at pp. 56-57.)

True enough when dealing with regulations of commerce by the states or a states' efforts to avoid federal regulations. But the state power to tax non-discriminatorily and without the possibility of double taxation, i.e., a neutral tax, does not impinge on that power in the least. (Of course, the tax must also not be so great as to prohibit the commerce generally. Such a tax would be contrary to the due process idea that the tax must bear a sufficient relationship to the benefits and protections conferred by the state on the taxpayer. Also see argument, supra, regarding this Court's authority to review taxes under the due process clause as excessive.)

But the Court seized upon this lanauge from Board of Trustees in rendering the opinion that a customs regulation, tacitly reviewed by Congress, could void state taxes on goods which are in certain types of customs bond. McGoldrick

v. Gulf Oil Corp., 309 U.S. 414, 84 L.Ed. 840, 60 S.Ct. 664 (1940). No state-owned property was involved in McGoldrick v. Gulf Oil, and the court may have been able to invalidate the tax on the ground that it was not sufficiently related to the benefits and protections conferred by the state (see Clark, supra, at pp. 72-73).

Assume for a moment that the McGoldrick v. Gulf tax were a property tax on the goods which helped pay for fire and police protection rendered by the locality regardless of its customs status (note that Customs although theoretically "controlling" bonded goods does not protect them from fire or theft). McGoldrick logic clearly obliges local taxpayers, including competing oil companies dealing with domestic fuel, to pay for the privilege of protecting the foreign goods.

National pruposes, including the subsidizing of foreign enterprises or goods, are purposes of the nation as a whole and logically should not be funded by a restricted base of taxpayers. Congress, for instance, may deem it advisable to grant benefits to foreign companies doing business principally on the East Coast in order to obtain favorable treatment abroad for West Coast United States companies. Assuming that such a subsidy passes constitutional muster, it would be inappropriate to "fund" the East Coast subsidy by means of a reduction in eastern states' taxes on the foreign companies. The Western taxpayer receives the benefit of having U.S. companies located near him subsidized abroad, and may be affected by those companies' improved prospects. But it is the Eastern taxpayer who will be forced to support local and state services to the foreign company

without benefit to himself. He may have to support it by higher taxes or by accepting a lower level of governmental service overall. In short, Congressional subsidies of foreign enterprizes should be done with national resources, not local.

McGoldrick goes even further. If we assume, as do some state cases (see Int'l Shoe Co. v. Cocreham, 246 La. 244, 164 So.2d 314, cert. den. 379 U.S. 902 (1964); State ex rel. Ciba Pharmaceutical Prods. v. State Tax Comm., 382 S.W.2d 645 (Mo. 1964); and Smith, Kline & French Labs. v. State Tax Comm., 241 Ore. 50, 403 P.2d 375 (1965)), that the federal government can regulate commerce by prohibiting state action not amounting to regulations, we assume that there is simply no power reserved to the states. Adequacy of a locality's fire protection most assuredly affects interstate commerce, but can the federal government oblige the Pasadena Fire Department to give more protection to interstate shipped goods than it gives to goods produced in-state? The logic of McGoldrick, and the appellants would answer this question in the affirmative.

We have come full circle. Alexander Hamilton (no rabid supporter of states' rights by any means) said that the States,

> ". . . possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. . . . . And . . . an attempt on the part of the National Government to abridge them in the exercise of its would be a violent assumption of power, unwarranted by any article or clause of its Constitution." (Federalist Papers No. 32) (Emphasis added).

Now, Justice Jackson can say by way of concurring opinion,

> "Congress has not extended its protection and control to the field of taxation, although I take it no one denies that constitutionally it may do so. It may exact a single uniform federal tax on the property or the business to the exclusion of taxation by the state. It may subject the vehicles or other incidents to any type of state and local taxation, or it may declare them tax-free altogether." (Northwest Airlines v. Minnesota, 322 U.S. 292, 303, 88 L.Ed. 1283, 64 S.Ct. 950 (1944).)

We have traced this development of this change in attitude. The new one of total federal sovereignty has been made in complete ignorance of the proper view of the states' ability to tax. It has come about in reaction, not only to the

increasing speed and complexity of commerce, but also in response to new kinds of taxes.

Controls are indeed required to insure that those taxes remain neutral and non-discriminatory. But those tools are available without recourse to a wholesale revision of the federal-state relationship.

V
THE APPROPRIATE CONTROLS ON THE STATES' POWER TO TAX

As this Court has reviewed an increasing number of state income and sales taxes which affect interstate commerce, it has developed an increasingly closer scrutiny of those taxes on constitutional grounds. One of the latest of these analyses appears in Complete Auto Transit v. Brady, supra. The factors used there appear to this amicus curiae to narrow the impact of state taxes on interstate enterprises to the point where they are neutral, not favoring intra-state commerce over inter-state, and discouraging excessive taxes generally. It is this logic which provides the basis for protecting this and all inter-state taxpayers from discriminatory or regulatory taxes.

a. Nexus. The activity of the taxpayer in the taxing jurisdiction must be sufficient to justify some tax.

b. Relationship to Benefits. Interrelated with the nexus test is the requirement that the tax bear some reasonable relationship to the benefits conferred. It may well be that two separate kinds of tax based on the same benefit would violate this principal (for instance, if in Complete Auto Transit, Inc. v. Brady, supra, the tax payer had alleged that the state was also imposing a "franchise tax" which had no other basis than the fact that the company was doing business in the state). This test would also exclude the tax which is so excessive that it becomes prohibitory, even if it is non-discriminatory (for an interesting view of excessive taxation see Parkinson, The Law and Profits).

c. Discriminatory. The tax must not discriminate against interstate commerce. A tax which discriminates in favor of certain parts of interstate commerce may also be subject to this test, since discrimination either for or against, is regulation, and Congress' extensive rate-tax-safety controls, in the area of national business, might be thwarted even by favortism on the part of a state. (The national government may believe, for instance, that the business being favored should receive equal treatment with other businesses.)

d. Fair Apportionment. This requirement can be viewed as part of the relationship to benefits test, since the benefits and protections conferred by the taxing jurisdiction can only be conferred on that portion of the business having a "presence" in the jurisdiction. A tax which goes beyond that presence (however measured) exceeds both the nexus and relationship requirements as well as being unfairly apportioned.

Thus, it can be seen that the interstate and foreign taxpayers are protected from unilateral regulation by a state tax. Such regulation (assuming that Congress has pre-empted the field of interstate business tax encouragement and regulation), whether it be favoring the interstate taxpayer or burdening it, must be approved by Congress. For it is the federal government which can, by the means at its disposal, encourage or burden various types of business.

The tariff rates classicly demonstrate Congress' full authority to regulate foreign commerce. Any individual state's effort to increase the burden on an importer vis-a-vis the interstate dealer, or to decrease that burden would tip the delicate balance established so completely by Congress.

But the interstate rates-regulations and tax benefits are equally pre-emptive of state regulation unless agreed to by Congress. For instance, the oil depletion allowance, an effort to encourage oil exploitation, would be thwarted if state governments imposed additional taxes on oil companies. In like manner a state exemption in favor of such oil companies would thwart the purpose of Congress in repealing that allowance.

The taxpayer is protected from regulatory state taxes.

It is also protected from regulatory procedures. Logically, the same requirements for uniformity of taxes should apply to the procedures for their levy and collection. Thus, any procedures which violate the standards of Complete Auto Transit would also be regulatory and would constitute state

regulations of interstate or foreign commerce without Congressional approval. But it is not ordinarily undue discrimination to tax different classes of owners of different kinds of property by different methods and by means of different sets of officers. Salt Lake City v. Utah Copper Co., 294 F. 199, cert. den. 264 U.S. 590, 68 L.Ed. 864, 44 S.Ct. 403 (1924) and writ of error dismissed 267 U.S. 610, 69 L.Ed. 813, 45 S.Ct. 461 (1925).

CONGRESSIONAL AUTHORITY - CONCLUSION

There is little doubt that the requirement for neutrality of state taxation goes beyond the usual case language conferring on state legislatures broad authority to classify taxpayers, although there is little support for the present state activity in the field of regulating commerce. But Congress' activity in the field of commerce and tax encouragements has become so complete that the states' regulatory tax powers over commerce must give way. Only then will foreign and interstate commerce be brought to the point where all businesses doing business in a state will be doing so knowing that it is the federal government they must look to for encouragement in their efforts. Their cost of doing business in that state will, then, be like any other business. The business will be paying its "fair share" of state costs (see Business Taxes in State and Local Governments, 1972, Lexington Books p. 1, "Opening Comments" by Lewis C. Bell), and will not be obliged to bear another's. The federal government's authority

over regulation will be as complete as it ought to be. But at the same time the states will be assured, as they were in 1789, that they will be able to maintain fire and police protection, keep up their schools, help their poor and sick, all without the threat that someday, somehow, the federal government will order them to cease functioning.

Before the advent of federal economic incentives in the area of taxation, state regulation of commerce by tax incentives would be unthinkable. (For a declaration of the economic responsibility at the federal level, see Gilbert, "Toward Full Employment" Fortune Magazine, October 1945.) State donations to business were declared not to constitute public policy (Citizens Savings & Loan Assoc. v. Topeka City, 87 U.S. (20 Wall.) 665, 22 L.Ed. 455 (1875).

Now government encouragement to industry has become accepted, but the conflict between the federal and state levels of that activity have become so confusing that the businesses meant to be aided are subject to incentives at one level of government while being burdened at the other.

Even-handed, simplified taxation is no longer possible by carrying on the assumption that states can encourage or discourage businesses by means of tax incentives while the federal government is trying to do the same thing. That even-handed treatment is required in today's fast paced world. It requires that we look toward the federal system as an opportunity to resolve local problems at the local level, while assuring all of those who support those efforts financially that they are not paying more than their fair share.

At the same time, the states are entitled as a matter of right to collect the revenue necessary for them to function, as long as that revenue collection does not regulate commerce.

VI
APPORTIONED TAXES - INTRODUCTION

The comments of the appellants on the issue of apportioning taxes in accordance with business activity in the state reflects the concern of business and government alike that the states maintain a neutral stand regarding all taxpayers. Those comments also reflect the need to fairly apportion taxes in the context of changes in business organizations. But it must be remembered that the Commission's existence has little to do with the concept which was approved by this court in 1891 (see Clark, supra, at pp. 53, et seq., concerning the development of the apportionment concept).

APPORTIONING STATE TAXES HAS NOTHING TO DO WITH THE COMMISSION ITSELF

The appellants have ascribed the problems involved with apportioning state taxes directly to the existence of the Commission. The short answer to these contentions (Appellants' Opening Brief, pp. 35-47) is that the testing of the apportionment concept should be conducted in the context of actual taxation. The existence of the Commission, or lack thereof, will not make the apportionment concept disappear, and the apportioning of state and local taxes based upon the activity of businesses within the state does not provide any rationale for either reducing or obliterating its powers.

The doctrine of absention encourages the states to solve their tax disputes. California's methods for resolving those disputes have been declared to be adquate to bring that doctrine into play. (Mandel v. Hutchinson, 494 F.2d 364 (1974).)

The appellants' contentions regarding the apportionment concept are appropriately introduced in the courts when the apportioned taxes are imposed by the states, as they have been in the past.

IN ANY CASE, THE APPORTIONMENT OF STATE AND LOCAL TAXES HAS BEEN APPROVED BY THE COURTS

The concept of apportioning taxes in accordance with a business' activities in a state is not new. In 1891 property taxes were apportioned on the basis of the business' activity within the state. (Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 35 L.Ed. 613, 11 S.Ct. 876 (1891). That apportionment principle was approved by various cases over the years (Branniff Airways v. Nebraska, 347 U.S. 590, 98 L.Ed. 967, 74 S.Ct. 757 (1954); Ott v. Mississippi Barge Lines, 336 U.S. 169, 93 L.Ed. 585, 69 S.Ct. 432 (1949); Flying Tiger Lines v. County of Los Angeles, 51 Cal.2d 314, 333 P.2d 323 (1958) and Japan Lines Ltd. v. County of Los Angeles, 61 Cal.App.3d 562, 132 Cal.Rptr. 531 (1976) [this decision accepted for hearing by the California Supreme Court]); Standard Oil Co. v. Peck, 342 U.S. 382, 96 L.Ed. 427, 72 S.Ct. 309 (1952).

APPORTIONMENT OF STATE AND LOCAL TAXES IS APPROPRIATE IN THE CONTEXT OF BOTH INTERSTATE AND INTERNATIONAL COMMERCE

The appellants suggest that it has been traditional to impose taxes on a business only at its formal place of domicile. It is true that, when business was primiarlly local in character, taxing an organization only where it was incorporated was factually related to the services provided by the taxing state. The businesses performing their activity primarily in the jurisdiction of domicile, thus used to reimburse the very government giving that business its benefits and protections. The cost of the goods sold by that business would, then, reflect the cost of providing those benefits and protections and would be in accordance with the guidelines of Complete Auto Transit v. Brady, supra.

But as businesses have become larger and have crossed both state and national lines, this situation changed. This Court recognized that the most dynamic and expanding industries of the last century, the railroad companies, were receiving services from jurisdictions other than their technical domicile. The railroads' keeping their movable property in the other jurisdictions created the strain on the other jurisdictions' governmental support. The ability of those other jurisdictions to attempt to recoup that cost was affirmed early (Pullman's Palace Car Co. v. Pennsylvania, supra).

But it was not until Standard Oil Co. v. Peck, supra, that the apportionment concept was applied to prohibit the jurisdiction of technical domicile from taxing property on a basis not reflecting that property's activity in the jurisdiction. (That case would also be supported by the guidelines of Complete Auto Transit v. Brady, supra.)

There must be little doubt that during the period between Pullman's Palace Car Co. v. Pennsylvania, supra, and Standard Oil Co. v. Peck, supra, some states were, by imposing taxes not related to the level of activity in the jurisdiction, actually creating multiple taxation.

The appellants contend that apportioning state taxes will cause multiple taxation. It is probable that any development of state and/or local taxation will create this difficulty, and the courts must resolve these difficulties as soon as practical. But the desirability of adopting our taxes to changing circumstances remains.

The international commerce situation provides additional ad hoc complications to which the appellants point. They rely on these complications, first, for the proposition that no apportionment of state taxes should take place, and, second, that the Commission should be disbanded because it supports the apportionment concept.

Although the international difficulties do not support the appellants' conclusions, as previously pointed out, it is appropriate to deal with those problems, because state taxation, like state or local treatment of aliens general, does impact

upon international affairs. The appellants would suggest that because change in the taxation of foreign businesses will cause their governments to complain, that change must not be undertaken. But it has been accepted by both our federal government and other countries that the states do exert an independent sphere of action with which the federal government may not interfere. The federal government has both the authority and the duty to take appropriate steps to maintain a consistent foreign policy including reimbursing aliens for treatment which was not compensated for under state law.

We have seen that the states possess the authority to tax as long as that taxation is not regulatory (being non-prohibitory, non-discriminatory and related to the governmental services rendered). When the states impose any such tax uniformly on all businesses which are conducting activity within its borders, they will probably impose it on some foreign interests. It is possible that some such tax will not dovetail with the taxes imposed upon the foreign business by its own country or by another foreign country. Taxes on our country's businesses may run this same risk (see Sea-Land Services, Inc. v. County of Alameda, 12 Cal. 3d 772, 117 Cal. Rptr. 448, 528 P. 2d 56 (1974)).

But to suggest that a state tax must follow some pattern based more on tradition than upon the fact of benefits and protections conferred gives up a state's ability to obtain reimbursement for the governmental services it renders.

The taxation of an interstate or international business only where it is domiciled, as the appellants

appear to suggest, would lead to escapes from taxation since the domicile state could impose taxes related to the benefits it confers and all other states would be obliged to collect no tax.

How do state and local taxes fit into the federal system and international affairs? From what has been said above, it is clear that the states may not treat foreign businesses any better or worse than interstate businesses. The states have the duty not to regulate foreign commerce (Hines v. Davidowitz, 312 U.S. 52, 85 L. Ed. 581, 61 S. Ct. 399 (1941)). (It is this Amicus Curiae's position that the states may not regulate interstate commerce without Congressional approval because of the many rates, tax, and safety laws affecting virtually every phase of interstate commerce, including the amount of profit.) But to say that states may not impose a tax which is legitimate under this country's laws is to say that states may not obtain reimbursement for services they render only because those services are rendered to foreign enterprises. Such subsidies of business activity would do more to cause confusion in international relations than any of the problems posed by appellants. The cost of doing business in California should be the same with respect to the amount of in-state activity (whether measured by property, sales, employees or whatever) for intra-state businesses as for interstate or foreign businesses. The appellants propose that the measure be different for businesses operating from outside the state.

A government's ability to tax depends, in the long run, upon its evidencing good faith and reasonability. Insofar as government creates

"special" distinctions for "special" people, it does less than its best, and the states and localities should not distinguish between taxpayers on the basis of the geographic location of the taxpayer's domicile. (WHYY v. Glassboro, 343 U.S. 117, 21 L. Ed. 2d 242, 89 S. Ct. 286 (1968).) Our treatment of foreign enterprises by the states and localities must be the same as the treatment we provide our own nationals. This concept is supported by the legal analysis above as well as by the treaties to which this country is a party (see Supplementary Convention between U. S. A. and the Kingdom of Sweden Relating to Income and Other Taxes, 15 U.S.T. 1824, T.I.A.S. 5656, Act II (c)(7).

APPORTIONMENT OF "NON-BUSINESS" TAXES IS APPROPRIATE

One of the features of the apportionment of taxes to which appellants object is the taxation of rents and other "non-business" income at the location of the income producing property. Surely, the "traditional rule" for allocating the taxes on this income provides cogent reasons for apportionment. To say that Delaware should receive the benefits of taxing rent income from property located in California would seem to run contrary to the guidelines provided by Complete Auto Transit v. Brady, supra, as a tax not related at all to the benefits and protections provided by Delaware.

APPORTIONMENT - CONCLUSION

Thus, the impact of appellants' apportionment arguments leads one to conclude that apportionment is proper especially in the context of international businesses whose domicile gives no more benefits to that business than does a state domicile of an active multi-state business. The governments ought to receive a return for the business activity within their jurisdictions and apportionment is the means by which that may be accomplished, as long as the Complete Auto Transit tests are satified.

VII

STATE AND LOCAL TAXES, AND DISCRIMINATION

The appellants' contentions which are logically related to the actual activities of the Commission are primarily dealt with at appellants' opening brief, pp. 48-51. The important aspect of this portion of the appellants' brief is that it consists of suggestions made by the Commission. No matter how onerous, discriminating, or abusive an organization's suggestions may be, it would seem that some action be actually instituted before the 14th Amendment can be brought into play. The appellants have concluded only that the letters from which they quote show that the Commission may discriminate, assumedly at some time in the future.

There is indeed a problem of discrimination in the area of state and local taxation. But the ultimate conclusion must be that states do not the authority to differentiate between intrastate, interstate, and international commerce.

They have, and ought to have, the authority to impose levies, which are non-regulatory, non-discriminatory, and non-prohibitory, on any business, and suggestions by the commission, or the equally vocal business lobby do not constitute state action.

CONCLUSION

Subject to any 5th Amendment limitations which may apply, Congress has the authority to grant foreign businesses subsidies and exemptions in return for favorable treatment for United States businesses abroad. It does not have the authority to exempt such a business, or all business, from state taxation, as long as that state taxation does not regulate. But the states' taxation must be uniform.

As long as the states' taxes are uniform and appropriately related to the benefits conferred and to the activity of the taxpayer within the state, those taxes represent nothing more than a cost of doing business in the taxing jurisdiction. The goods sold by such businesses should reflect the benefits conferred, and subsidies are regulations of commerce which are not within the power of the states, but of national concern.

Thus, the appellants' claim that the compact takes away Congress' power is not borne out under

its commerce clause rationale. As long as the states do not regulate in their taxing policies, they not only avoid treading on Congress' powers, they create an atmosphere of certainty, uniformtiy, and fairness which must be the hallmark of government founded on the God-given right of its citizens to participate in its affairs.

Respectfully submitted,

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IN THE

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on behalf of themselves and all persons
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Appellants,

vs.

MULTISTATE TAX COMMISSION, et al.,

Appellees.

BRIEF OF AMICUS CURIAE

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BRIEF OF AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The amici curiae states are concerned by the representations in the Appellants' brief that the interests of the states which are not members of the Compact are adversely affected by its provisions and its operations and that the national interest is not served by the Compact. The amici curiae states are familiar with the Compact. They are in agreement with the basic objectives and goals of the Compact

and believe that it strengthens their basic policies and that of the Nation in the field of state taxation of multistate businesses. They do not believe that the Compact or its operation interferes with their sovereignty and their revenue policies or with the national interest. They believe that it is to their best interests that the Compact be held constitutional by this court. If it is declared invalid by this court for lack of congressional consent, they fear that other comparable interstate agreements for the exchange of information, consultation, adoption of uniform legislation and the issuance of advisory recommendations which have been in existence for a number of years may also be invalid for lack of congressional consent. They also believe that the construction of the compact clause of the Constitution of the United States urged by Appellants will require federal intervention in purely state affairs and weaken the federal system by preventing the states from cooperatively solving common problems without federal control. For these reasons, they file this brief in support of the position of the Appellees which they believe to be valid and proper in every respect.

To the states which join in this brief as Amici Curiae, the critical issue in the case at bar is this:

If two or more states wish to enter into an agreement which is merely cooperative in nature, does Article I, Section 10 of the United States Constitution require that the state must first obtain the consent of Congress?

By an agreement "merely cooperative in nature," we mean an agreement with the following characteristics:

(1) Any commission or other organization which is established by the agreement is entirely advisory, so that any decisions or recommendations which the commission might make can be implemented only by each individual state and at the sole discretion of that state;

(2) Any such commission is acting, in the exercise of any governmental powers, solely as the agent of of a state in a field and in a manner in which the state itself is constitutionally permitted to exercise its powers individually; and

(3) Any substantive law established by the agreement is solely uniform or reciprocal in nature.

The fears of the amici states are not remote or speculative in nature. Each amici state is a party to at least one of the 13 interstate agreements listed at page 121 of Appellants' Brief (Supplement C) which are presently in force despite not having received the consent of Congress. If this court were to adopt the arguments and theories urged by Appellants, it is entirely possible that all 13 agreements would be voided *ab initio*, causing irreparable harm to existing programs of cooperation among the states as well as "nipping in the bud" future cooperation among the states in resolving problems of common concern.

Thus, wholly apart from the narrow issue of

whether this Multistate Tax Compact itself is invalid for lack of congressional consent, the amici states are concerned that the court not adopt a standard for congressional consent which would unduly hamper the ability of states to adopt and implement agreements calling for joint action in resolving joint problems. Not every problem which transcends state boundaries is of national concern; net every such problem is susceptible to a national solution. Yet, by the very nature of congressional consent, any requirement that states obtain such consent elevates that problem to one of national concern and imposes a national solution by means of establishing a congressional "veto power" over state action, in effect allowing Congress to substitute its judgment for that of the party states.

To be sure, there are subjects or areas of concern for which states should be required to obtain congressional consent as a condition precedent to joint action. It is the intention of this brief to demonstrate that a proper balancing of the interests of the Nation and its member states involves a construction of the compact clause, Art. I, Sec. 10, Clause 3 of the United States Constitution, which (1) recognizes the limits of power of each government, (2) maximizes the flexibility of state governments to deal with specific problems, and (3) insures that problems of governmental concern which transcend state boundaries are dealt with expeditiously, i.e., that the test to be applied in determining whether congressional

consent is required be as certain and as cogent as possible.

ARGUMENT

I. Introduction

In "The Compact Clause of the Constitution—A Study in Interstate Adjustments," 34 Yale L. J. 685 (1925), then Professor Felix Frankfurter and James Landis list six instances of what they call "* * * new machinery devised during recent years in the settlement of problems which transcend State lines." 34 Yale L. J. at 688.

The first is adoption of uniform state laws, pursuant to recommendations of the National Conference of Commissioners on Uniform State Laws.

"By this method a vast domain of the commercial transactions of the country which do not respect State lines are sought to be brought under common legal control." Ibid.

The second method is reciprocal legislation,

> "* * * whereby the capacity of one State to harm or advantage another, when conflicting interests need adjustment, is exercised by creating immunities or handicaps conditioned upon like treatment by sister States." Ibid.

A modern example of this would be the reciprocal legislation involved in *Bode v. Barrett*, 412 Ill. 204, 106 N.E.2d 521 (1952), aff'd 344 U.S. 583 (1953). Pursuant to the Illinois statute, the Illinois secretary of state was authorized to enter into agreements with other states to exempt their residents from the Illinois motor vehicle tax, though they used

Illinois highways, if the other states extended like treatment to Illinois residents.

The third method is the practice of state courts, in certain fields "* * * to base decisions in these fields on grounds of needed harmony between jurisdictions legally independent of each other." Ibid at 689.

For the fourth method, the authors refer to various conferences and associations of governors and other state officials which "have more or less stimulated common state action." Ibid at 689. The National Governors' Conference, the National Association of Attorneys General, and the National Association of Tax Administrators are but the start of the long modern list.[1]

The fifth method is auxiliary federal legislation involving subsidies or grants-in-aid to the states. Ibid at 690.

The sixth method is described as:

> "* * * The regulation of interstate preserves through the practical fusion of distinct State administrative agencies by means of joint sessions and joint action in order to deal as a unit with legally separate parts of a common interest." Ibid.

Summing up, the authors state:

> "These six instances illustrate extra-constitutional forms of legal invention for the solution of problems touching more than one State. They were neither contemplated nor specifically provided for by the Constitution." Ibid. at 691

[1]See, e.g. Council of State Governments, The Book of the States, 1974-75, pp. 257-263. The Council acts as an umbrella organization for the associations listed therein.

Such "extra-constitutional forms of legal invention" have flourished since 1925. Whether they may continue to do so depends in large part upon the decision in the case at bar. For the Multistate Tax Compact here under attack, is but a combination of the first, second and fourth methods of interstate cooperation, all adopted by the legislatures of the member states in a single package labelled "Compact." It contains only uniform or reciprocal legislation coupled with a "commission" composed of state officials to stimulate common state action.[2]

The states which have adopted the Compact could have adopted any single part of the total package without obtaining congressional consent. And they could have adopted all of those parts individually, without combining them into the single package. This too would not require congressional consent.

Neither the decisions of this court nor logic suggest any reason why these "extra-constitutional" devices suddenly become unconstitutional without congressional consent when states agree to tie several of them together in a single package.

II. The Appropriate Test to Determine Whether a Compact or Agreement Among the States Requires Congressional Consent is Set Forth in Virginia v. Tennessee, 148 U.S. 503 (1893).

Not surprisingly, the construction of the compact clause, which the amici states urge upon this

[2]In Appendix A to this brief we analyze each provision of the Multistate Tax Compact and there demonstrate that each such provision is in essence simply one of the traditional "extra-constitution forms of legal invention."

court, is that set forth in *Virginia v. Tennessee*, 148 U.S. 503 (1893), a construction which would require congressional consent only for those compacts or agreements:

> "* * * which may tend to increase and build the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particiular subjects placed under their entire control." (148 U.S. at 518)

The amici states believe that the *Virginia v. Tennessee* test satisfies the three criteria of (1) proper allocation of governmental power, (2) maximum flexibility, and (3) certainty. For these reasons, the amici states urge this court to reject the narrow, strained construction of the compact clause offered by Appellants and uphold the validity of the Multistate Tax Compact under the doctrine of *Virgina v. Tennessee, supra.*

It is submitted that the compact clause of the Constitution of the United States (Article I, § 10, clause 3) does not dictate the drastic surgery on state and local taxation power urged by the Appellants. The compact clause, in our opinion, has been validly interpreted by this court in the early case of *Virginia v. Tennessee, supra.* That interpretation has been upheld by the courts on numerous occasions and was recently affirmed by this court in *New Hampshire v. Maine*, 426 U.S. 363 (1976). The *Virginia v. Tennessee* construction of the compact clause prevents either a shift of political power among the states which

could interfere or encroach upon federal supremacy or a shift of political power from the states to the federal government which could interfere or encroach upon areas of state sovereignty.[3] It strikes a meaningful balance between federal sovereignty and supremacy on the one hand and state sovereignty on the other hand. It prevents the states from exercising their sovereign powers in any manner which would embarrass or impede the powers or work of the federal government delegated to it by the Constitution of the United States. Likewise, it allows the states to freely exercise the powers reserved to them under the United States Constitution without interference from the federal government. This approach allows flexibility among the states to arrive at acceptable solutions to common problems in state and local taxation of multistate businesses without federal intervention and also freely permits federal involvement in this area when Congress finds the need to do so. It allows both the states and the federal government to pursue the means at their disposal to accomplish their common purpose to see that multistate-multinational businesses pay their fair share of state and local taxes in a uniform, equitable and fair manner, without

[3]In applying this test to Multistate Tax Compact, one commentator aptly notes:

> "* * * It is unconvincing to argue that a state becomes more dangerous to the federal government by using its constitutionally reserved powers more efficiently. Strange would be the concept of federalism which protects the supremacy of the federal government by keeping the states more inefficient than itself, or which considers the federal government threatened in its power (i.e., to regulate interstate commerce) when the effectiveness of the threat depends totally on that government's own failure to exercise such power." Sharpe, State Taxation of Interstate Business and the Multistate Tax Compact: The Search for a Delicate Uniformity, 11 Col. J. Law and Soc. Problems 231, at 254 (1976).

duplication and undue compliance requirements.

Understandably, the states desire to develop their own tax systems and administer their own tax laws without federal interference, and the federal government desires the states to do so if it can be accomplished within an acceptable framework which does not conflict with overriding federal policy in the area of state and local taxation of multistate-multinational businesses. All the states are seeking by enactment of the Multistate Tax Compact is to carry forward these mutual desires.

Appellants would destroy the meaningful balance dictated by *Virginia v. Tennessee* by *requiring* federal involvement with the reserve powers of the states if they seek to exercise those powers by the adoption of uniform legislation which is coupled with an advisory mechanism for the uniform interpretation and enforcement of the uniform legislation.

CONCLUSION

Therefore, we respectfully submit that this court should apply the *Virginia v. Tennessee* test in this case and affirm the judgment of the three-judge district court below.

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APPENDIX A

ANALYSIS OF THE OPERATIVE PORTIONS OF THE COMPACT

The Appellants contend that "* * * the Multistate Compact should be declared invalid unless and until the consent of Congress is obtained." (Appellants' Br. 52) The issue, they imply, is the validity or invalidity of the Compact *in toto.*

However, Article XII of the Compact contains a standard severability clause.[1] Accordingly, even though one portion of the Compact may be declared invalid as requiring the consent of Congress, the other portions may be declared valid. This provides an additional reason for scrutinizing each portion of the Compact to determine whether the consent of Congres is necessary for that specific portion.

A. **Article sI and II (App. E, pp. 54a-56a)**

These are simply statements of purpose and definitions. They are operative only in relation to other parts of the Compact, and therefore require no separate discussion.

B. **Article III, § 1, and Article IV (Taxpayer option to use Uniform Division of Income for Tax Purposes Act) (App. E, pp. 56a-65a)**

These provisions allow interstate taxpayers an option under which, if the taxpayer is subject to a net income tax in a party state, the taxpayer may elect to divide his income in accordance with the provisions of the Uniform Division of Income for Tax Purposes Act, promulgated by the National Conference of Commissioners on Uniform State Laws[2] or to divide his income in accordance with otherwise applicable state law. Clearly, a state could independently, apart from any compact, provide an interstate taxpayer with this same option.

[1]The text of the Compact is contained in Appendix E, pp. 54a-79a, of the separately bound Appendix A-F to the Jurisdictional Statement, and references will be to the text as contained therein.

C. **Article III, § 2 (Taxpayer option-short form) (App. E, p. 57a)**

This provision allows another option to interstate taxpayers. It provides that each party state or any subdivision thereof which imposes an income tax must allow a taxpayer meeting certain requirements to file a "short form" and to compute income tax liability simply on the basis of a percentage of sales volume within the state. The qualifying requirements for this option are designed to alleviate the necessity of the small businessman complying with the complications of an apportionment and allocation statute.

Again, like Article III, § 1, and Article IV, this option is essentially a uniform act, and could be adopted by any state independently of any compact.

D. **Article V (elements of sales and use tax laws) (App. E, p. 65a)**

This article adopts certain substantive provisions relating to sales and use tax laws, designed to prevent double taxation and promote ease of compliance by taxpayers. Again, the provisions of this article are essentially a uniform act.

E. **Article VI (the commission) (App. 3, pp. 65a-71a)**

Sections 1, 2 and 4 of this article involve the internal management of the Multistate Tax Commission and are essentially comparable to

[2]See, Vol. 9A, Uniform Laws Annotated, p. 448.

the bylaws of an organization of state officials, such as the National Association of Tax Administrators or the Council of State Governments. Section 3, the "powers" provision, generally covers the fields of research, dissemination of information, and proposal of recommendations. Again, these are functions essentially comparable to those performed by other groups of state officials, except for clause (d) of § 3, which gives the Commission a broad power to "do all things necessary and incidental to the administration of its functions pursuant to this compact." However, this clause raises no issues separate from those which may be raised by other provisions of the compact.

F. **Article VII (uniform regulations and forms) (App. E, pp. 71a, 72a)**

This article provides that the commission may adopt uniform regulations and forms for the administration of various types of taxes in the party states when such taxes involve uniform or similar provisions of law among the party states. This article also provides for certain procedures necessary for the adoption of such regulations and forms by the Commission.

However, any such uniform regulations and forms, to be legally effective, must be adopted by the individual states, in accordance with their own procedures for adoption of regulations and forms.

This point is critical. So far as the Commission is concerned, its function under Article VII is solely recommendatory. An identical function could be performed by such groups as the National Association of Tax Administrators, the Council of State Governments, or for that matter, the American Bar Association.

G. **Article VIII (audits) (App. E, pp. 72a-74a)**

The cooperative audit provisions of Article VIII

build upon two mechanisms which are common in state tax administration. The first is the exchange, on a reciprocal basis, of tax information between states including information obtained from an audit.[3]

The second mechanism is the use of the courts of one state, again on a reciprocal basis, for the collection of taxes imposed by a sister state.[4]

Article VIII simply allows a state to use, if it so chooses, the Multistate Tax Commission as an auditing agent, instead of the auditing staff of a sister state or its own auditing staff. And the Article further provides that the courts of member states may be utilized to obtain from a taxpayer the information needed for the audit, so that the reciprocity commonly existing on the collection level is provided on the auditing level as well.

H. **Article IX (arbitration) (App. E, pp. 74a-78a)**

This provision is not in force at the present time.[5] However, if in force, it would provide a mechanism whereby a taxpayer could secure a uniform application of the allocation and apportionment provisions of Article IV, and thereby avoid any possible double or multiple taxation by two or more party states.

This mechanism is essentially the same as that

[3]See, e.g., Cal Rev. and Tax Code, § 26453c (Deering). The effect of such reciprocity is that one state can, as a practical matter, be performing an audit not only for itself but also for a sister state.

[4]See, e.g., Cal. Rev. and Tax Code, §§ 30, 31 (Deering). A list of the states having reciprocal provisions is found at P-H State and Local Taxes, All States Unit, para. 281.

[5]The reason Article IX is not in force is explained by the district court at note 5 of its opinion. See Jur. St. App. A, at p. 8a.

embodied in the uniform interstate arbitration of death taxes act, under which disputes between states as to the domicile of a decedent are to be settled by arbitration.[6]

I. **Articles X (entry into force and withdrawal), XI (effect on other laws and jurisdictions) and XII (construction and severability) (App. E, pp. 78a, 79a)**

These provisions are mainly "boiler plate," and require no separate discussion.

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[6]This act is in force in 13 states. See p. 338, Vol. 9B, Uniform Laws Annotated.